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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

DAVID GUNDY, WARDEN,

Petitioner

vs.

CLARENCE SCOTT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Michael A. Cox
Michigan Attorney General

*Timothy A. Baughman
Chief of Research,
Training, & Appeals
Wayne Count Prosecutor's Office

Thomas M. Chambers
Assistant Prosecuting Attorney
Special Assistant Attorney General
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: 313-224-5749

*Counsel of Record

STATEMENT OF QUESTION PRESENTED FOR REVIEW

The circuits are in conflict on whether the Brecht[1] "substantial and injurious effect" harmless error test, which essentially provides for de novo review by a federal court on habeas review, survives the adoption of the AEDPA, particularly where the state court has made a finding that a constitutional error was harmless beyond a reasonable doubt. Should this Court grant certiorari to resolve this important question?

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[1] *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

TABLE OF CONTENTS

Index of Authorities.....ii

Statement of Question Presented for Review.....1

Opinions Below.....3

Statement of Jurisdiction.....3

Constitutional Provisions Involved.....3

Statement of the Case.....4

Reason(s) for Granting the Writ.....24

A) The Michigan Court of Appeals Opinion.....24
B) The United States District Court Opinion.....25
C) The Sixth Circuit Opinion.....25
D) The Conflict in the Federal Circuits.....26
E) Petitioner's Position.....27

Relief.....30

Appendix A.....1a

Appendix B.....15a

Appendix C.....16a

Appendix D.....46a

Appendix E.....58a

Table of Authorities

Cases

United States Supreme Court

Brecht v. Abrahamson,
507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)..1, 24

Bruton v. United States,
391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).....4, 24

Lockyer v. Andrade,
538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).....28

Mitchell v. Esparza,
540 U.S. 12, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003).....27

O'Neal v. McAninch,
513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).....28

Woodford v. Visciotti,
537 U.S. 19, 123 S.Ct. 154 L.Ed.2d 279 (2002).....28

United States Court of Appeals

Medina v. Hornung,
372 F.3d 1120 (9th Cir. 2004).....26

United States District Court

Scott v. Bock,
241 F.Supp. 780 (2003).....4

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Now Comes the State of Michigan, by **Michael A. Cox**, Michigan Attorney General, **Timothy A. Baughman**, Chief of Research, Training, and Appeals, Wayne County Prosecutor's Office, and **Thomas M. Chambers**, Special Assistant Attorney General and Assistant Prosecuting Attorney, Appeals, and prays that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals of the United States of America, entered in this case on June 9, 2004.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals, the Order of the Michigan Supreme Court denying leave to appeal, the Opinion of the District Court, and the Opinion of the Sixth Circuit affirming the District Court are all attached as appendices, as is the Order denying the Petition for Rehearing (**Appendices A** through **E**, respectively).

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its Opinion on June 9, 2004. That Court then issued an Order denying a Petition for Rehearing on July 8, 2004.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . . . to be confronted with the witnesses against him.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

This was an appeal by Petitioner from an Opinion and Order of the District Court, *Scott v. Bock*, 241 F.Supp. 780 (2003), which granted Respondent's Petition for Writ of Habeas Corpus on the basis that the introduction and admission of the codefendant's statement at Respondent's joint trial with his codefendant, which implicated Respondent, violated *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and that such admission had a substantial and injurious effect on the jury's verdict in two ways: as to Respondent's identification as the shooter and as to the element of premeditation raising the level of the murder from second-degree murder to first-degree murder.[2] On appeal, the Sixth Circuit agreed with the District Court as the question of premeditation, but as to the identification of Respondent as the shooter, the Sixth Circuit disagreed with the District Court:

> As to identification, we agree with the State (and disagree with the district court) that the evidence connecting Scott [Respondent] to the shooting, even without Collier's confession, was so considerable as to make the possibility that the confession would undermine the essential fairness of the jury's deliberations quite improbable.
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> * * * *

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[2] The Michigan Court of Appeals had found any error in admitting the codefendant's statement to be harmless beyond a reasonable doubt.

> Even if one characterizes this testimony as circumstantial evidence (which it was) and even if one characterizes the Collier confession as direct evidence (which it was), the circumstantial evidence was so overwhelming as to make immaterial the risk that the admission of the Collier confession would have a "substantial and injurious effect" on the jury's deliberations over identification.
>
> (Opinion, pp. 8-9).

Based on what the Sixth Circuit had stated in its Opinion, as set forth above, Petitioner asked the Court by way of a Petition for Panel Rehearing to modify its Opinion and Order so as to authorize the entry of a judgment of conviction of second-degree murder, Michigan Complied Laws, MCL 750.317, and felony-firearm, Michigan Compiled Laws 750.227b, and for a resentencing, or for a retrial of Petitioner on the charge of first-degree murder, at the option of the State. Petitioner's Petition for Rehearing was denied.

Statement of Facts

Respondent, along with a codefendant, Isaac Collier, was charged in a criminal Information in the Detroit Recorder's Court with the offenses of first-degree premeditated murder, Michigan Compiled Laws 750.316, the victim being one Elwin Lilley; first-degree felony murder, Michigan Compiled Laws 750.316; and felony-firearm, Michigan Compiled Laws 750.227b. The matter was tried before one jury.

Included among the evidence presented at trial was the following:

Cornelia Ford testified that on April 2, 1994, at about 2:00 p.m., she was at the Amoco Gas Station at Middlebelt and Wick Roads in Romulus in her red 1992 Pontiac Grand Prix, which she identified as being depicted in People's Exhibit No. 1; the license number of her vehicle was 644 WFF. As she was pulling into the gas station, she noticed two men running from the area of the McDonalds Restaurant, which was next to the gas station. When she got out of her car to pump her own gas, she was approached by one of the two men she saw jogging; the man grabbed her right arm and told her to give him her car keys and he wouldn't hurt her. She dropped her keys and the man got in her car and tried to start the car, but had problems doing so. As the man was trying to get the car started, she leaned over him and grabbed her purse out of the car; her driver's side window had been open. The man finally got her car started and he drove around the gas station and then out onto Middlebelt Road. At that time, there had been a vacant field between the McDonalds and the Amoco Gas Station. There was a traffic light at Middlebelt and Wick, which was where the man went with her car; the man pulled behind another car at the light. The light at Middlebelt and Wick was red, so the man pulled up over the curb and went around the car in front of him, running the red light. After she saw the man go through the red light, she did not see how far the man went on Middlebelt (R.14g, Jury Trial Transcript, Vol. I, 127-136; Joint Appendix, 73-82).

Ms. Ford identified Petitioner's codefendant, Isaac Collier, in court as the man who took her keys and car. After Collier took off in her car, she went into the gas station and asked the attendant to call the police. The Romulus Police responded. That evening, she went to the Romulus Police Station where she told the police what had occurred; while she was there, she gave a description of the man who took her car, and a composite was reproduced on the computer. On April 5, 1994, she went back to the Romulus Police Station where she looked at a photo array of six photographs; she

selected Isaac Collier's picture out of the array. On the following day, she went to the Romulus Police Station again where she identified her 1992 Grand Prix in the police pound. In the car was an empty cassette tape which had contained a cassette tape of the group "Too Short"; she did not get the actual tape back until sometime later – she identified the tape as People's Exhibit No. 5. She was asked if Isaac Collier had been wearing a hat; she responded that he had not. When asked if she could give any description of the other man she had seen jogging with Isaac Collier, Ms. Ford responded that this second man had been tall and slim, with a dark complexion, wearing a black jacket (R.14g, Jury Trial Transcript, Vol. I, 135-142; Joint Appendix, 81-88).

Romulus Evidence Technician Jeffrey Lazarski testified that on the afternoon of April 2, 1994, he was called to a McDonalds Restaurant on Middlebelt Road near Wick Road. There were officers already on the scene. His attention was drawn to the rear of the McDonalds where he observed two cars, a Ford Escort and a Buick Century; he identified People's Exhibit No. 6 as a photo of the two cars as they were situated when he saw them, and Exhibit No. 7 as a photo of the gray Buick. There was a man inside the Buick who had obviously been shot. The driver's rear bumper of the Buick was touching the front passenger bumper of the Ford Escort; there was also damage to the front of the Buick. The weather that day was warm, summery. The windshield of the Buick was shattered in a spider web type pattern and it had a red substance on it, which he suspected to be blood. The driver's side window was three-quarters of the way down. The man in the Buick had an injury to his head; he was deceased. The southeast corner of the McDonalds building was also damaged, and it was evident that the Buick had struck this part of the building; there were tire marks leading up from the parking lot to the corner of the building which was damaged (R.14g, Jury Trial Transcript, Vol. I, 144-151; Joint Appendix, 89-96).

From the rear of the McDonalds parking lot, he confiscated a white hat with a marijuana plant on it; he identified this hat as People's Exhibit No. 11 (Jury Trial Transcript, Vol. I, 153; Joint Appendix, 97). On cross-examination, he testified that he found no bullet casings in the parking lot of the McDonalds (R.14g, Jury Trial Transcript, Vol. I, 163; Joint Appendix, 98).

Charles Kirajic testified that at about 2:00 p.m., he was in his car, stopped for a traffic light at Middlebelt and Wick; he was in the curb lane. At that intersection was an Amoco Gas Station. While he was sitting at the light, something caught his attention; it was a man in a long black overcoat running across Wick Road. Out of the corner of his eye, he then saw a red flash and he looked and saw a red Grand Prix almost side-swipe him as it came out of the Amoco Gas Station; he identified People's Exhibit No. 1 as a picture of this vehicle. The Grand Prix then ran the red light. When the light turned green, he followed the Grand Prix and saw it pull onto the eastbound entrance ramp to I-94; the door of the Grand Prix then opened and the guy he had seen before, running on Wick Road with the overcoat, got into the car. Next to the Amoco Gas Station was a vacant field, and next to that was a McDonalds. The overcoat he saw the man wearing had been black. After the man with the black overcoat got in the Grand Prix, the car took off eastbound on I-94. When the man in the black overcoat got into the Grand Prix, he (the witness) was 50 feet away from the Grand Prix. When asked if the man he had seen in the black overcoat who had gotten into the red Grand Prix was in the courtroom, the witness pointed to and identified Petitioner (R.14h, Jury Trial Transcript, Vol. II, 7-14; Joint Appendix, 104-111).

Yolanda Pezzet testified that on April 2, 1994, sometime before 2:00 p.m., she and her 12-year-old son were at the McDonalds at Middlebelt and Wick Roads. They had gotten their food by going through the drive-through and were parked on the side, eating their food. As they were sitting

there eating their food, she was looking out of her rearview mirror. She noticed a black Escort and then she heard what sounded like a loud pop a few minutes after that. Upon hearing the pop noise, she turned to her left and saw the black Escort parked next to a gray car. She noticed a black man wearing a black trench coat with a gun in his hand; the man in the black trench coat was standing between the gray car and the black Escort. The gun the man in the black trench coat was holding was pointed towards the driver's side of the gray car. She then saw the gray car go up towards the clearance sign of the McDonalds and she then saw blood splatter onto the windshield of the gray car. The gray car, which was a Buick, then went backwards and stopped when it touched the Escort; she identified People's Exhibit No. 6 as a picture of the gray car and the Escort as they were situated after the gray car went backwards and came to rest touching the Escort, and she identified People's Exhibit No. 7 as a picture of the gray car – the windshield of the gray car had blood on it. After she observed that, she observed the guy in the red pickup truck parked next to her go running to see where the guy who had done the shooting had run off to. She saw the man in the black trench coat take off running towards Wick Road. There had been another person in the black Escort, the driver, but she did not see what happened to him. She and her son sat in the car until the police came. When asked if the person she had seen wearing the black trench coat and holding the gun while he stood next to the driver's side door of the Buick was in court, Ms. Pezzat pointed to and identified Petitioner (R.14h, Jury Trial Transcript, Vol. II, 18-26; Joint Appendix, 113-121).

Benjamin Pezzat testified that he was with his mother at the McDonalds on April 2, 1994, the day before Easter. They were having lunch at McDonalds at about 2:00 p.m., having just come from Kohls. The McDonalds they went to was near the Airport. As they were sitting in the car eating lunch, he heard a loud pop; he turned around and saw a man wearing a black trench coat with a gun. The gun the man

had was pointed at a man who was sitting on the inside of a car; he identified People's Exhibit No. 7 as a picture of the car the man who had the gun pointed at him was in. The man in the car in People's Exhibit No. 7 was sitting in the driver's side; the man with the gun was closest to the driver's side. He (the witness) saw what looked like blood on the windshield of the car depicted in People's Exhibit No. 7. When asked if he could identify anyone in court as the person he saw with the black trench coat and the gun, the witness responded that he could not (R.14h, Jury Trial Transcript, Vol. II, 37-42; Joint Appendix, 125-130).

Roger Nohouig testified that on April 2, 1994, at about 2:00 p.m., he was at the McDonalds Restaurant on Middlebelt across from the Airport. He had just come from inside the Restaurant and had brought his food out to eat in the vehicle he had driven there; he had driven his friend's red pickup truck up to the McDonalds. He was parked on the south side of the McDonalds, on the side opposite the Amoco Gas Station. Just as he started to eat his food, he heard what he thought was a shotgun blast, which was extremely loud; he also heard the squealing of tires at that time. He turned in the direction of the noise and observed a gray vehicle smash into the corner of the McDonalds; the vehicle then rolled back and came to rest up against a black Escort – he identified People's Exhibit No. 6 as a photo of the two vehicles as he saw them after the gray vehicle rolled back to the black Escort. People came running out of the McDonalds and he yelled for someone to call 911 and then he ran towards the gray car. As he was running towards the gray car, he saw two black men with their hands on the gray car, trying to push it off of the black Escort; these two men then fled on foot towards the Amoco Gas Station. He went past the two vehicles to see where the two men were fleeing to; once he saw that they had gone in the direction of the Amoco Station, he turned back to the gray vehicle. By that time, there were two other men at the vehicle and he asked them if there was anything he could do, to which they responded that there was not. There was

a man in the gray car, but he was not responsive at all; he had what appeared to be a wound to the left side of his head and there was a lot of blood (R.14h, Jury Trial Transcript, Vol. II, 43-48; Joint Appendix, 131-136).

He attended a lineup but told the police that he had not gotten a good enough look at the two men to be able to pick them out of a lineup. He was able to say that one of the men had been tall and slim and had been wearing a black trench coat; he had also noticed that as the man had been fleeing, he (the man) was trying to secure something underneath the coat. The other man had been shorter and heavier than the man in the trench coat (R.14h, Jury Trial Transcript, Vol. II, 49; Joint Appendix, 137).

Nancy Vojakovic testified that she had been at the McDonalds on Middlebelt on April 2, 1994 at about 2:00 p.m. She and her son, Roberto Gonzalez, had been in a vehicle in the drive-through line, which was in the back of the McDonalds. She was shown People's Exhibit No. 6 and identified it as a picture of the car that hit the back of the McDonalds building. As she and her son were at the menu sign, she heard a loud noise, which she thought was a car back-firing. She then heard a car accelerate loudly and she saw the car depicted in People's Exhibit No. 6 smash into the back of the McDonalds, directly behind the car she and her son were in. When the car hit the building, she saw the head of the man in the car hit the windshield; her van was close enough to the car that blood and glass got splattered onto her van. There was only one man in the car; this person was an older white man, about 50 years old. After the car hit the building, it backed up somewhat from the impact; she did not see where it came to rest (R.14h, Jury Trial Transcript, Vol. II, 52-57; Joint Appendix, 140-145).

As she turned to her son to tell him what she had just seen, she saw two men running along the side of the van she was in. She turned the corner to tell the lady at the drive-through window to call 911. As far as the two men she saw running alongside her van, one man ran towards the Amoco

Gas Station next to the McDonalds, and the other man, the man in the black trench coat, ran towards I-94. As the two men ran past the passenger side of the van she was in, she was close enough to see the face of one of the men, but she could not make out of the face of the other man; the man whose face she was able to make out was the man wearing the black trench coat. She identified Petitioner in court as this man (R.14h, Jury Trial Transcript, Vol. II, 57-59; Joint Appendix, 145-147).

Roberto Gonzalez testified that on April 2, 1994, at about 2:00 p.m., he and his mother, the former witness, were at a McDonalds. As they were waiting in the drive-through line, he heard a bang. He and his mother looked back and then his mother proceeded to drive by the drive-through window. He then looked over at the Amoco Gas Station and saw a guy in a black trench coat on the far side of the Amoco Station closest to Wick Road. He saw this person then start walking down Middlebelt Road towards the freeway. He did not see this person well enough to be able to identify him because by the time he saw him, the man was too far away (R. 14h, Jury Trial Transcript, Vol. II, 64-66; Joint Appendix, 152-154).

Dean Patton testified that on April 2, 1994, at about 2:00 p.m., he was at the McDonalds Restaurant on Middlebelt Road. As he was just stepping out of his car and was walking towards the door, he noticed two vehicles to his right. One vehicle was blocking the drive-through and the other vehicle was right behind it; this was in the back of the McDonalds. There were two men who appeared to be running back and forth between the first car and the second car; the two men "were kind of putting their hands or their arms in the first car and then running to the back car." The two cars in question were a Buick and an Escort; he identified People's Exhibit No. 6 as a photo of the two cars. The two men then tried to push the car in front, the first car, away from the car behind; the two men were unable to push the Buick out of the way of the Escort. After trying to push the Buick

out of the way, the two men then ran back to the back vehicle, opened the doors. and started putting things in their pockets and in their pants. One of the men. the one by the driver's side of the Escort, must have seen him looking at him because this man then took off running towards the Amoco Gas Station north of the McDonalds. The other man, the one who did not take off running, continued to put things in his pants. He also saw this man put a gun in his waistband; this person with the gun was wearing a black trench coat. After the man put the gun in his waistband, the man went up to the first car and put his arm into the vehicle and moved it back and forth. The man then seemed to notice him (the witness), and he (the man) took off running, also towards the Amoco Station (R.14h, Jury Trial Transcript, Vol. II, 67-72; Joint Appendix, 155-160).

When asked if he saw either of the two men in court today, Mr. Patton responded that he saw both of the men in court; he identified Petitioner in court as the man he had seen wearing the black trench coat, and he identified Isaac Collier as the other man. At the police station, he gave a description of the man in the black trench coat and a composite drawing was made from that (R.14h, Jury Trial Transcript, Vol. II, 73-74; Joint Appendix, 161-162).

On cross-examination, the witness testified that the two men appeared to be rummaging through the first car and then running back and forth between the two cars (R.14h, Jury Trial Transcript, Vol. II, 94; Joint Appendix, 164).

Hamad Jaber testified that in April of 1994, he owned a motel called the Grand Motel located at 22755 Grand River in Detroit. The motel had 12 units and rent was paid on a daily basis. He identified People's Exhibit No. 17 as a registration card for Unit 2. The registration card reflected that one Michelle Swartz was the tenant; her signature appeared on the card (R.14h, Jury Trial Transcript, Vol. II, 99-101; Joint Appendix, 166-168).

On April 3, 1994, two police detectives came out to the motel and he gave them consent to search. He also gave the two detectives, those being Detectives Ondejko and Malaniak, a garbage bag of everything from Unit 2. He explained that every unit was cleaned out on a daily basis (R.14h, Jury Trial Transcript, Vol. II, 102-103; Joint Appendix, 169-170).

Dominic Triola testified that on April 2, 1994, in the morning hours before noon, he was in Unit 14 at the Grand Motel. Sometime between 10:30 a.m. and noon, he loaned his 1987 Escort, which he identified as being depicted in People's Exhibit No. 6, to a person who was also staying at the motel whom he knew as Junior; Junior had been staying in Unit 2 with his girlfriend Michelle. He identified Isaac Collier in court as the person he knew as Junior, the person to whom he lent his Escort on April 2. He had loaned Collier his car before, to go up to the party store, and, that morning, Collier asked him if he could borrow the car that morning. A tall black man, who everyone used to call "Six Nine", got into the Escort with Isaac Collier; he identified Petitioner in court as the person he knew as "Six Nine." Collier got behind the wheel; Collier told him (the witness) that he would be back in an hour. He never saw his car again that day, nor did he see Collier or Petitioner later that day. He did not see his car again until a couple of weeks later; the Romulus Police told him where he could pick his car up. He did not remember what Isaac Collier was wearing on April 2, but he noted that Collier usually wore a baseball cap. He was shown People's Exhibit No. 11 and identified it as the cap he would see Collier wearing. He also recalled that Petitioner was wearing a long dark gray coat that day (R.14h, Jury Trial Transcript, Vol. II, 105-110; Joint Appendix, 172-177).

Dillard Collier testified that he was the uncle of Isaac Collier. On April 2, 1994, he (the witness) lived on Faircrest in Detroit. On that date, he saw his nephew, Isaac Collier, over at his (the witness's) brother's house on Chelsea; this was in the afternoon. His brother was barbecuing. When he

(the witness) drove up to his brother's, Isaac Collier was already there; he (Isaac Collier) was there with Clarence, whom he identified as Petitioner. There came a time when he (the witness) left the barbecue, his nephew (Isaac Collier) and Petitioner were supposed to meet him over at his house on Faircrest. When he got home, he started working on his car. His nephew and Petitioner then showed up in a red car; he identified People's Exhibit No. 1 as a picture of the car they showed up in. After he got done fixing his car, he, Isaac, and Petitioner went in his car over to the west side; after he and his nephew dropped Petitioner off, they went over to another house he (the witness) owned on Shaefer. A couple of days after that, he and his nephew were in a party store and police officers arrested his nephew. The officers then asked him (the witness) about the red car; he told them that the red car was in the garage over at his house on Faircrest. The police accompanied him over there and took the car away (R.14h, Jury Trial Transcript, Vol. II, 115-122; Joint Appendix, 179-186).

Assistant Wayne County Medical Examiner Kalil Jiracki testified that on April 3, 1994, he performed an autopsy on the body of Elwin Lilley. Mr. Lilley had been pronounced dead at 9273 Middlebelt in Romulus. His external examination revealed an entrance wound in the left cheek; there was soot and gunpowder around this wound. He recovered pellets from inside the wound which led him to conclude that this was a shotgun wound. The wound was located towards the front of the head and below the left ear, close to the jaw line. Mr. Lilley also had a bruise to the inner aspect of his nose from the left side and another to the tip of his nose; he also had a scrape to the left side of the head above the left ear. From the soot around the wound, he determined that the barrel of the gun which caused the wound had been within a few inches of Mr. Lilley's face at the most; there was no evidence that the barrel of the gun actually touched Mr. Lilley's head, however (R.14h, Jury Trial Transcript, Vol. II, 125-129; Joint Appendix, 189-193).

His internal examination revealed that the pellets had traveled from left to right and downwards. Numerous pellets were recovered and placed in an envelope which he identified as People's Exhibit No. 18. The shotgun wound which Mr. Lilley suffered would have caused instantaneous death or death within 30 seconds at the most (R.14h, Jury Trial Transcript, Vol. II, 130-131; Joint Appendix, 194-195).

Lisa Campbell testified that she knew Petitioner, whom she identified in court. She also knew him by his nickname, "Six Nine." Petitioner had, at one time, been going with her sister, Venita Campbell; they had several children together. In April of 1994, she was living at Birwood in Detroit; her sister, Venita, was also staying there in April of 1994. She talked to Petitioner on Sunday, April 3, 1994, when Petitioner came over saying that he wanted to see his kids. He said that he wanted to talk to his kids because he had been involved in a murder (R.14h, Jury Trial Transcript, Vol. II, 132-136; Joint Appendix, 196-200).

Venita Campbell testified that in April of 1994, she was living on Birwood in Detroit with her sister Lisa. At that time, she knew Petitioner, whom she identified in court; he was the father of her children. Either on Saturday or Sunday, April 2/3, 1994, she saw Petitioner and Junior in a red car, which she identified as being depicted in People's Exhibit No. 1; she also identified Issac Collier in court as the person she had referred to as Junior. On that Saturday or Sunday, April 2/3, 1994, Petitioner told her that he had gotten into some trouble out at the Airport, but he did not go into any detail about it. She was asked if, on the following Tuesday, April 5, 1994, two Romulus police officers came back to her house and took a taped statement from her; she responded that they did. When asked if she gave them any details about what Petitioner told her, she responded that she did not remember. After listening to the tape, she acknowledged having told the police that, when they asked about what Petitioner had said about the trouble he had gotten into at the Airport, that Petitioner had told her that he had to

kill a guy, that he had been trying to rob the guy. She testified that she told the police this because they had threatened to take her children (R.14h, Jury Trial Transcript, Vol. II, 138-144;157; Joint Appendix, 202-208; 210).

On cross-examination, Venita Campbell testified that what she told the Romulus Police had not been the truth. She acknowledged, however, that the police had not told her what to say (R.14h, Jury Trial Transcript, Vol. II, 160-161; Joint Appendix, 213-214).

On redirect, she testified that the police told her that she better say that Petitioner was involved in a murder or else they'd take her kids; then she denied that the police told her this. She then testified that it was her idea to tell the police that Petitioner had told her that he had killed someone, but she did not remember telling the police that Petitioner told her that the killing occurred during a robbery (R. 14h, Jury Trial Transcript, Vol. II, 163-166; Joint Appendix, 216-219).

Romulus Police Officer Greg Brandemihl testified that on April 5, 1994, at about 7:00 p.m., he had the residence of 15116 Faircrest in Detroit under surveillance; he was on the lookout for one Isaac Collier. He observed a person he believed to be Isaac Collier and another person come out of the house he had under surveillance, get in a car, and go to the party store. He followed the vehicle to the party store, and he and another officer placed Isaac Collier under arrest. Collier had a set of keys in his pocket which he stated belonged to a Grand Prix. Dillard Collier was the other person Isaac Collier was with. He (the witness) and other officers went back to Dillard Collier's house on Faircrest; in the garage, they found a red Grand Prix (R.14h, Jury Trial Transcript, Vol. II, 172-177; Joint Appendix, 225-230).

Romulus Police Sergeant Dan Snyder testified that he was one of the officers who took the taped statement from Venita Campbell. He testified that both Venita Campbell and her sister Lisa had agreed to talk to them and the tape recorder he used to tape Venita Campbell was not hidden. Neither he nor his partner threatened Venita Campbell in any

way to get her to make a statement and say what she said; that is, neither he nor his partner threatened to take her kids away. He testified that he had also been involved in the arrest of Isaac Collier. He and other officers went to the garage of the residence Isaac Collier had been coming out of, which belonged to one Dillard Collier, and in the garage was a vehicle which they confiscated; he identified People's Exhibit No. 1 as a photo of this vehicle. He testified that the Grand Prix which was recovered was registered to one Cornelia Ford (R.14i, Jury Trial Transcript, Vol. III, 37-45; Joint Appendix, 243-251).

Sue Kay Rucker testified that on April 2, 1994, she was staying at the Grand Motel at Grand River near Lahser in Detroit. She was staying in Units 5 and 7. She knew a person nicknamed "Junior"; she identified Isaac Collier in court as the person she knew as "Junior". She also knew a person nicknamed "Six Nine"; she identified Petitioner in court as the person she knew as "Six Nine." She also knew Dominic Triola, who stayed at the Motel off and on; Dominic owned a black Escort (R.14i, Jury Trial Transcript, Vol. III, 66-67; Joint Appendix, 257-258).

On the morning of April 2, 1994, she saw Isaac Collier leave in Dominic's black Escort with Petitioner. Just before they left, they had been in Unit 2; she knew this because she had been in Unit 2 with Michelle Swartz. As Petitioner and Collier left, she saw Petitioner with a black sawed-off shotgun, which had a pistol grip and electrical tape on the grip; Petitioner had this weapon in his waistband, and it was covered up by his overcoat. Collier and Petitioner were gone for about six or seven hours and then they returned in a red Grand Prix, which she said looked like the car depicted in People's Exhibit No. 1 (R.14i, Jury Trial Transcript, Vol. III, 68-70; Joint Appendix, 259-261). On redirect, Ms. Rucker testified that when she Collier and Petitioner came back to the Motel, Petitioner came up to Unit 2 and knocked on the door; Michelle went with Collier and Petitioner in the Grand Prix, and she (the witness) went back

to her room (R.14i, Jury Trial Transcript, Vol. III. 77; Joint Appendix, 264).

Upon a finding that the prosecution had shown due diligence to produce Michelle Swartz as a witness, Ms. Swartz's preliminary examination testimony was read into the record; she testified at the preliminary examination as follows:

She knew Isaac Collier and Petitioner, both of whom she identified in court at the preliminary examination. She had been dating Collier for some time, and Petitioner was a friend of Collier's. On April 2, 1994, she was in her unit at the Grand Motel, Unit 2, and, sometime in the morning, Collier and Petitioner were in her room also. At around 10:00 or 11:00 a.m., Collier and Petitioner left in Dominic Triola's black Escort; Petitioner was wearing a trench coat at that time. When they came back some time later, they were in a red Grand Prix, which Collier was driving. When they came back, Petitioner came up to the door; Sue and a man named Rick were in Unit 2 with her. Petitioner told these people to leave, and he told her to get in the red Grand Prix; she did what he told her. She was told not touch anything in the car; she sat in the back seat and Petitioner sat in the passenger seat. She asked Collier if this was a stolen car and Collier told her it was. They went to the party store to get some beer. They then went to Petitioner's girlfriend's house; Petitioner went up to the house to talk to his girlfriend. Later that night, Collier told her that Petitioner had shot someone (R.14i, Jury Trial Transcript, Vol. III, 81-92; Joint Appendix, 265-276).

She saw Petitioner with a gun that day; it was the same gun she had seen him with before. Petitioner had mentioned a couple of times in the past that he was a "hit a lick" man, meaning that he robbed people (R.14i, Jury Trial Transcript, Vol. III, 92-93; Joint Appendix, 276-277).

On cross-examination by Petitioner's attorney, Ms. Swartz testified that she rented a room at the Grand Motel on a daily basis; she stated that that was what she had done on

April 2, 1994. She testified that when she left on April 2 with Collier and Petitioner, she never checked out of the room, but she never went back to it. Also on cross, Ms. Swartz testified that she never saw Petitioner with a gun on April 2, 1994 until when Collier and Petitioner picked her up in the Grand Prix. On redirect, Ms. Swartz was asked what became of the red Grand Prix; she responded that it was parked in a garage on Faircross (sic) (R.14i, Jury Trial Transcript, Vol. III, 93-96; Joint Appendix, 277-280).

After being qualified as an expert in the field of firearms identification, Michigan State Police Officer Jon Stanton testified that he was asked to assist in the investigation of a homicide which occurred involving a victim named Elwin Lilley. He was handed People's Exhibit No. 18 and identified it as an envelope containing 41 lead pellets; he testified that these lead pellets were what he would expect to find in a shotgun shell. He testified that the lead pellets would go in a plastic shot collar with gunpowder, which would in turn go into the barrel of the shotgun; he identified People's Exhibit No. 21 as a plastic shotgun collar. He then identified People's Exhibit No. 22 as a fired shotgun shell, 410 gauge, Remington Peters brand; there were no pellets in the shell because they had been shot out. He was then handed People's Exhibit No. 23 and identified it as containing four manila envelopes and another bigger envelope with his laboratory numbers and initials on them; he testified that these envelopes held seven live shotgun shells, 410 gauge, Remington Peters brand, all of the same color. He was then shown People's Exhibit No. 24 and identified it as being an envelope containing 410 gauge, Remington Peters brand shotgun shells, same color as the ones he had seen and referred to previously (R.14i, Jury Trial Transcript, Vol. III, 100-109; Joint Appendix, 284-293).

He cut open one of the seven live shotgun shells on People's Exhibit No. 23 and found the pellets inside to be the same weight and size as those on People's Exhibit No. 18, which were the pellets from the fired shotgun shell. The

plastic shotgun collar that he cut open, so that he could look at the pellets inside, was the same as the shotgun collar of the shell that had been fired (People's Exhibit No. 22). He knew that the shotgun shell on People's Exhibit No. 22 had been fired because he saw the little dent which was left on the head of the shell, which had been caused by the firing pin of the gun striking the head; the firing pin of the gun striking the head of the shotgun shell was what activated the primer. The friction would ignite the primer which would detonate and send a flame into the powder, starting the powder to burn; this would leave a little mark on the bottom. He also saw, on the fired shotgun shell, tool marks on the brass part of the shell just above the head; these were likely caused by the extractor in a shotgun, so that the person firing the gun can manually take the shell out or an ejector kicks the shell out of the gun automatically. He saw the same marks on one of the live shells he observed, which was his own Item No. 10, which was one of the items on People's Exhibit No. 23; he was able to determine that the six marks on his Item No. 10 had been made by the same gun which had fired the shotgun shell that he observed on People's Exhibit No. 22. What was possible was that his Item No. 10 had been loaded in the gun but had been extracted before it had been fired; sometimes when a person used a gun, he would load it up, and then take the shell out. He then testified that it was possible to load two shells into a short-barreled double barrel shotgun, which he had seen before, and to fire one shot without firing the shell in the other barrel (R.14i, Jury Trial Transcript, Vol. III, 109-115; Joint Appendix, 293-299).

Romulus Police Sergeant Michael Ondejko testified that he was one of the officers who responded to the scene of the shooting at the McDonalds on Middlebelt. When he arrived, the victim, Mr. Lilley, was still at the scene; in Mr. Lilley's Buick, he observed a suitcase, a newspaper, and a large Easter Lily plant. Mr. Lilley's wallet was also eventually recovered (R.14i, Jury Trial Transcript, Vol. III, 123-125; Joint Appendix, 302-304).

On that same day, he and Sergeant Snyder went to the Grand Motel to talk to some people there. On the following day, April 3, 1994, Easter Sunday, he made a second trip to the Grand Motel where he talked to the owner, Mr. Jaber. Mr. Jaber gave them a large, black plastic bag full of items taken out of Room 2; some of the items were on People's Exhibit No. 23, which included seven 410 gauge shotgun shells. All seven of the shotgun shells were live shells and all were of the same type, color, and manufacturer; and, all came from Room 2. He also identified, from the garbage bag of items taken from Room 2, People's Exhibit No. 25, which was a day planner with names and addresses and telephone numbers; taped to the front of the book was a picture of Perry Scott, Petitioner's brother (R.14i, Jury Trial Transcript, Vol. III, 125-129; 156; Joint Appendix, 304-308; 329).

On the evening of April 5, 1994, he learned of Isaac Collier' arrest. He had occasion at that time to go to the address of 12374 Griggs in Detroit, which was a vacant multi-unit apartment building; he believed at that time that that was where he could find Petitioner. Petitioner was not at that location when he got there, but he did find a spent 410 gauge shotgun shell in the hallway of the apartment building, outside one of the apartments; he identified this spent or fired shotgun shell as People's Exhibit No. 22. He was then shown People's Exhibit No. 24 and identified it as being two live 410 gauge shotgun shells which were removed from Apartment 8; also in Apartment 8, he found mail and papers addressed to Petitioner. When he got back to the station, he interviewed Isaac Collier and took a statement from him; the statement was partly in narrative form and partly in question and answer form (R.14i, Jury Trial Transcript, Vol. III, 130-145; Joint Appendix, 309-323). The pertinent portions of Collier's statement are found in the District Court's Opinion and Order (R.16, Opinion and Order, pp. 6-8; Joint Appendix, 13-15).

Sgt. Ondejko testified that found in Collier's property when he was arrested was a cassette tape which had the title "Too short", which he identified as People's Exhibit No. 5 (R.14i, Jury Trial Transcript, Vol. III, 146; Joint Appendix, 323).

REASON(S) FOR GRANTING THE WRIT

The circuits are in conflict on whether the Brecht[3] "substantial and injurious effect" harmless error test, which essentially provides for de novo review by a federal court on habeas review, survives the adoption of the AEDPA, particularly where the state court has made a finding that a constitutional error was harmless beyond a reasonable doubt. This Court should grant certiorari to resolve this important question.

A) The Michigan Court of Appeals Opinion

Following his convictions and sentence, Respondent appealed by right to the Michigan Court of Appeals. One of the claims he made was that the introduction and admission of his codefendant's statement at his joint trial with the codefendant, which implicated Respondent, violated *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The Michigan Court of Appeals held that there was no error, but even if there was, "we find that the admission of the statement against [Respondent] was harmless beyond a reasonable doubt because the properly admitted evidence of guilt was overwhelming and the prejudicial effect of the codefendant's statement was so insignificant by comparison."

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[3] *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

B) The United States District Court Opinion

The United States District Court granted Respondent's Petition for Writ of Habeas Corpus on the basis that the introduction and admission of the codefendant's statement at Respondent's joint trial with his codefendant, which implicated Respondent, did violate *Bruton*, and further, applying *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), that such admission had a substantial and injurious effect on the jury's verdict in two ways: as to Respondent's identification as the shooter and as to the element of premeditation raising the level of the murder from second-degree murder to first-degree murder.

C) The Sixth Circuit Opinion

On appeal, the Sixth Circuit affirmed the decision of the District Court granting Respondent's Petition for Writ of Habeas Corpus. In so holding, the Sixth Circuit rejected Petitioner's argument that the *Brecht* "substantial and injurious effect" test did not survive the passage of the AEDPA:

> The State argues that the *Brecht* "substantial and injurious effect" harmless-error standard did not survive the passage of The Antiterrorism and Effective Death Penalty Act (AEDPA). Pub.L. No. 104-132, 110 Stat. 1214 (1996). Instead, the State contends, federal courts must view a state court's harmless error ruling through the lens of AEDPA and ask whether the state court's application of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)--requiring the error to be harmless beyond a reasonable doubt--was "unreasonable" under 28 U.S.C. §§ 2254(d)(1). Our Court,

> however, has already rejected this argument and as a result continues to view *Brecht* as the proper yardstick for measuring these claims. *See Nevers v. Killinger,* 169 F.3d 352, 371 (6th Cir.1999) (noting that "the amendments to §§ 2254(d) [AEDPA] do not vitiate in any way the premise set out in *Brecht*"); *see also Hill v. Hofbauer,* 337 F.3d 706, 718 (6th Cir.2003) ("The *Brecht* standard has survived the enactment of [ ] AEDPA."); *Bulls v. Jones,* 274 F.3d 329, 335 (6th Cir.2001).

D) The Conflict in the Federal Circuits

The Ninth Circuit has recently addressed the very question posed here, that is, whether a federal court considering a habeas petition may grant the petition based on its own finding that a constitutional violation had a "substantial and injurious effect" on the verdict, without giving deference to a state court finding that the constitutional violation was harmless beyond a reasonable doubt. As the Ninth Circuit observed in *Medina v. Hornung,* 372 F.3d 1120 (9th Cir. 2004), there are two approaches to reviewing the state court's harmless error analysis under the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1), upon which the circuits are split:

> (1) Federal courts may include the *Brecht* analysis as part of the "unreasonable application" determination. Under this analytical model, the reasonableness of the state court's *Chapman* application is determined by conducting a *Brecht* test. If the prejudice in the case warrants relief under *Brecht,* the state court's *Chapman* analysis

> necessarily violated the "unreasonable application" clause of §§ 2254(d)(1).
>
> (2) Alternatively, federal courts may apply the *Brecht* analysis as a separate legal construct. Under this model, federal courts first determine whether the state court's harmless error analysis was objectively unreasonable under the "unreasonable application" clause of §§ 2254(d)(1). Only if a predicate finding of unreasonableness is made would the federal court apply *Brecht* to determine whether the habeas petitioner should nevertheless be denied relief.

372 F.3d at 1125-1126. As the Ninth Circuit noted further, the Sixth Circuit took the lead by following the first approach, and the Tenth Circuit has elected to follow the second approach. 372 F.3d at 326, fn. 3. As far as its own circuit is concerned, the Ninth Circuit decided to follow the second approach, finding that that was consonant with this Court's rather recent decision in *Mitchell v. Esparza,* 540 U.S. 12, 124 S.Ct. 7; 157 L.Ed.2d 263 (2003) (per curiam), in which this Court held that "habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." 124 S.Ct at 12. As the Ninth Circuit aptly noted, this Court, in upholding the state court's harmless error analysis, did not refer to or apply *Brecht. Medina v. Hornung, supra*, 372 F.3d at 1126.

E) Petitioner's Position

In *Mitchell v. Esparza, supra,* 124 S.Ct at 12, this Court stated that a federal court may not grant a habeas petition if the state court simply erred in concluding that the

State's errors were harmless; rather, habeas relief is appropriate only if the state court applied harmless error review in an "objectively unreasonable" manner. And, as this Court once again reiterated, an "*unreasonable* application" of federal law is different from an *incorrect* application of federal law.

The *Brecht* standard, as refined by this Court in *O'Neal v. McAninch,* 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995), provides, on the other hand, that "where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of the error," *id.*, 513 U.S. at 437, 115 S.Ct. at 995, the petitioner must prevail. *Id.*, 513 U.S. at 436, 115 S.Ct. at 994. Essentially, the *Brecht* test provides for de novo review by the federal judge deciding the habeas petition. De novo would mean, as it ordinarily does, a fresh, independent determination of "the matter" at stake, so that no deference is due the conclusion under review. Yet, such review is clearly in contravention of what Congress intended in its adoption of §2254(d)(1), as this Court has indicated in its most recent Opinions, *Lockyer v. Andrade,* 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003); *Woodford v. Visciotti,* 537 U.S. 19, 123 S.Ct. 154 L.Ed.2d 279 (2002), and more pointedly so in *Mitchell v. Esparza, supra.*

The Ninth Circuit was correct in determining that the approach whereby federal courts must first determine whether the state court's harmless error analysis was objectively unreasonable under the "unreasonable application" clause of §§ 2254(d)(1), rather than first applying *Brecht,* or actually only applying *Brecht*, is the only view consonant with this Court's recent decision in *Mitchell v. Esparza, supra*, and with the intent of Congress. And while the other approach seems to also apply an "unreasonable application" test (it provides for the federal court to apply *Brecht*, and, determine for itself under *Brecht* whether the error had a substantial and injurious effect, and if it so finds, it then necessarily follows

that the state court's finding of harmless error is an unreasonable application of federal law, that is, of *Chapman v. California,* 386 U.S. 18, 87 S.Ct 824, 17 L.Ed.2d 705 (1967), a view to which the Sixth Circuit subscribes, it really is only paying lip service to that test, because it still pays no real deference to the state court decision.

In light of this Court's recent decision in *Mitchell v. Esparza, supra,* and the language contained in that decision, and the fact that *Brecht* is not even mentioned in the decision, the *Brecht* "substantial and injurious effect" harmless error test has not survived the passage of the AEDPA, at least where the state court has found constitutional error to be harmless beyond a reasonable doubt.

RELIEF

Wherefore, Petitioner respectfully requests that this Honorable Court grant certiorari in this matter, or that, in lieu of granting certiorari, it reverse the judgment of the Sixth Circuit and remand this matter for application of the standard set forth by this Court in *Mitchell v. Esparza, supra*, that is, for a determination whether the state court's finding of harmless error was "objectively unreasonable," and not just incorrect.

Michael A. Cox
Michigan Attorney General

*Timothy A. Baughman
Chief of Research,
Training, & Appeals
Wayne County Prosecutor's Office

Thomas M. Chambers
Wayne County Assistant Prosecuting Attorney
Special Assistant Attorney General
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: 313-224-5749

*Counsel of Record

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
May 30, 1997

v

No. 184478
Recorder's Court
LC No. 94-004460

ISAAC COLLIER, JR,.

Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

No. 184480
Recorder's Court
LC No. 94-004460

CLARENCE D. SCOTT,
Defendant-Appellee.

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Following a joint jury trial in the Detroit Recorder's Court, defendant Isaac Collier, Jr. was convicted of felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), second-degree murder, MCL 750.317; MSA 28.549, and unarmed robbery, MCL 750.530; MSA 28.798. Defendant Clarence Scott was convicted of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Collier was sentenced to the mandatory term of life imprisonment without the possibility of parole for the conviction of felony murder and ten to fifteen years for the conviction of unarmed robbery. Collier's conviction of second-degree murder was vacated by the trial court at sentencing. Scott was sentenced to the mandatory terms of life imprisonment without the possibility of parole for both convictions of felony murder and first-degree murder, and two years for felony-firearm. Defendants now appeal as of right. We vacate Scott's conviction of felony murder, and affirm the remaining convictions and sentences of both defendants.

This case arises out of the shooting death of Elwin Lilley on April 2, 1994 near Metro Airport in Romulus. Defendants attempted to steal money from the victim while he was in his parked car in the parking lot of a McDonald's restaurant. Scott, who had a sawed-off shotgun in the waistband of his pants, put the gun to the victim's head and demanded money. After the victim started his car and attempted to drive away, Scott shot him in the head. Both defendants then took some items from the car. Collier then ran to a gas station and stole a getaway car

Defendant Collier raises two issues on appeal. He first contends that there was insufficient evidence to be convicted as an aider and abettor of felony murder and that he is entitled to a new trial because the trial court erred in failing to instruct the jury on the requested cognate lesser offense of accessory after the fact. We do not find either issue to require reversal.

I

First, Collier argues that there was insufficient evidence to convict him of felony murder as an aider and abettor. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316; MSA 28.548. *People v Turner,* 213 Mich App 558, 566; 540 NW2d 728 (1995). To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of

the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Id.*, p 568.

Taken in a light most favorable to the prosecution, there was sufficient evidence to sustain defendant's conviction of felony murder as an aider and abettor. In his police statement, defendant Collier admitted that he and Scott planned to steal money from someone. Collier also stated that Scott got out of the car, "stuck the gun on the man," and demanded the man's money. Scott then shot the victim when the victim attempted to drive away. Collier was also able to perfectly describe the gun to the police (a "sawed-off, one shot, 410 gauge" gun). Under these circumstances, there is sufficient evidence that Collier had the requisite intent; that is, that these defendants created a very high risk of death or great bodily harm with knowledge that such was the probable result. See *id.*, p 572.

II

Defendant Collier next argues that the trial court erred in failing to give his requested instruction on the cognate lesser offense of accessory after the fact. In determining whether to give an instruction on a cognate lesser offense, the record must be examined, and if there is evidence which would support a conviction of the cognate lesser offense, then the trial court, if requested, must instruct on it. *People v Pouncey,* 437 Mich 382, 387; 471 NW2d 346 (1991). However, there must be sufficient evidence that the defendant could be convicted of the lesser offense. *Id.*

This Court has recently held that the offense of accessory after the fact is not a cognate lesser offense of murder. *People v Perry,* 218 Mich App 520, 533; 554 NW2d 362 (1996). However, this is in contrast to *People v Usher,* 196 Mich App 228, 234; 492 NW2d 786 (1992), where this Court stated that the crime of accessory after the fact can be a cognate lesser included offense of aiding and abetting first-degree murder. In following *Perry,* there is no error in the trial court's refusal to instruct on accessory after the fact because it is not a cognate lesser offense of murder. Even were we to apply *Usher* to this case, we would find no error. A person is an accessory after the fact when, after obtaining knowledge of the principal's guilt after the completion of the crime, that person renders assistance in an effort to hinder the detection, arrest, trial, or punishment of the principal. *Usher, supra,* p 232. In this case, Collier did not obtain knowledge of Scott's guilt *after* the completion of the crime. Collier and Scott worked together to steal money from someone. Collier waited in a car while Scott attempted to rob the victim of his money and then shot him as he attempted to drive away. Although Collier did steal a getaway car after the shooting, it is clear that Collier and Scott participated in an armed robbery together which resulted in the shooting death of the victim. This is not a situation where Collier merely rendered assistance to Scott to elude the crime scene.

Accordingly, the trial court did not err in denying Collier's requested instruction on accessory after the fact.

No. 184480

On appeal, defendant Scott raises five issues. He contends that the trial court abused its discretion when it denied his motion for severance or a separate jury, that the court erred in denying his motion to quash the information on

the felony murder count, that the court erred in denying his motion to suppress evidence as the fruit of an illegal search,that his right to confrontation was violated when the codefendant's statement was read to the jury, and that his convictions of both felony murder and first-degree murder violate double jeopardy. We agree that the convictions of both felony murder and first-degree murder violate double jeopardy and we vacate the conviction of felony murder. However, we affirm Scott's remaining convictions and sentences as we do not find any other issue to require reversal.

III

Defendant Scott first argues that the trial court abused its discretion in denying his motion for a separate trial or, alternatively, for a separate jury. The decision to sever or join defendants lies within the discretion of the trial court. Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana,* 447 Mich 325, 331; 524 NW2d 682 (1994). The use of a separate jury is a partial form of severance to be evaluated under the standard applicable to motions for separate trials. *Id.*

In his motion for severance, defendant requested a separate trial because codefendant Collier had made an incriminating police statement implicating Scott and exculpating himself in the shooting. It was Scott's contention that Collier's attempt to exculpate himself at the expense of inculpating Scott would deny Scott a fair trial. Therefore, it appears that Scott was arguing that he would be prejudiced by the admission of Collier's police statement as the statement would not be admissible against Scott if Collier

did not testify at trial. See *id.*, p 346; *Zafiro v United States,* 506 U.S. 534; 113 S Ct 933; 122 L.Ed.2d 317 (1993).

We find no abuse of discretion based on the record before us. Even if Scott was concerned that the unredacted police statement of a nontestifying codefendant might be improperly admitted against him, this was simply not the case presented to the trial court at the time of the motion. There was every indication that Collier would testify at trial, and would thus be subject to cross-examination. However, it was not until the third day of trial, after the motion for severance was made, that trial counsel informed the court that Collier would not testify. At the time that Scott moved for the severance, all parties believed that Collier would testify and there was no claim of mutually exclusive or antagonistic defenses. Further, a confession is not antagonistic for purposes of determining whether to sever a trial where, as here, the confession of a codefendant incriminates both the codefendant and the defendant. *People v Jackson,* 179 Mich App 344, 349; 445 NW2d 513 (1989), vacated in part on other grounds 437 Mich 866 (1991).

Therefore, Scott had not made any showing that clearly, affirmatively, and fully demonstrated that his substantial rights would be prejudiced and that severance was necessary to rectify the potential prejudice. *Hana, supra,* p 346. Accordingly, the trial court did not abuse its discretion in denying Scott's motion for severance.

IV

Defendant Scott next argues that the trial court erred in denying his motion to quash the felony murder charge. Scott argues that but for the confession of Collier, there was no evidence of an enumerated felony to support a bindover on

a felony murder charge. We review the circuit court's affirmance of the district court's decision to bind over defendant on the felony murder charge for an abuse of discretion. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991); *People v Meredith (On Remand)*, 209 Mich App 403, 410; 531 NW2d 749 (1995).

If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial. MCR 6.110(E). There must be some evidence from which each element of the crime may be inferred. *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996).

Here, there was probable cause to believe that defendant Scott committed the crime of felony murder. The parties stipulated that the victim died from a gunshot wound to his left cheek. Venita Campbell testified that on the day of the crime, Scott told her that he had gotten into some trouble at the airport and that he had to kill someone in the course of a robbery. Yolanda Pezzat, who was at the McDonald's restaurant at the time of the shooting, testified that she heard a loud pop and saw Scott with a gun standing by a gray car. Dean Patton also testified that he saw two men rummaging through a Buick in the McDonald's parking lot. Patton saw one of the men walk up to the car, pull out a gun, and stick the gun into the driver's side window. Patton also saw the two men take things from the car, fill their pockets, and transfer those items to another car. After the two men left, Patton saw a dead man in the Buick.

Accordingly, the district court did not abuse its discretion in binding over defendant Scott for trial on the charge of felony murder. The evidence established probable cause to believe that Scott committed the crime of felony murder.

V

Defendant Scott next argues that the trial court erred in denying his motion to suppress evidence as fruit of an illegal search of his apartment. A trial court's ruling on a motion to suppress evidence is reviewed de novo. *People v Goforth,* ___ Mich App ___; ___ NW2d ___ (Docket No. 191325, issued 3/14/97), slip op, p 2, citing *Ornelas v United States,* 517 US ___; 116 S Ct 1657; 134 L Ed 2d 911, 919-920 (1996); *Thompson v Keohane,* 516 US ___; 116 S Ct 457; 133 L Ed 2d 383 (1995). The trial court's factual findings are reviewed under the clearly erroneous standard of review. MCR 2.613(C).

In order to show that a search was legal, the police must show either that they had a warrant, or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement. *People v Davis,* 442 Mich 1, 10; 497 NW2d 910 (1993). Exceptions to the warrant requirement include: (1) searches incident to an arrest, (2) automobile searches and seizures, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances. *Id.* The trial court ruled that defendant Scott had no "personal proprietary interest" in the apartment building, and that the landlord, as the owner, had the right to enter the premises and allow the police to search the apartments.

In this case, defendant Scott's apartment was searched by the police without a warrant. The police seized two live .410-gauge shotgun shells and other documents. The owner of the apartment building, Saben Spearman, testified at the evidentiary hearing that defendant lived in apartment number eight in the building and that defendant was the manager of the building. Contrary to the trial court's ruling, there can be no dispute that defendant, as the resident of apartment eight, had a reasonable expectation of privacy in the apartment. Further, it is well-settled that an owner may *not* give permission to the police to search a tenant's premises unless the tenant's contract so provides. *Stoner v California,* 376 US 483; 84 S Ct 889; 11 L Ed 2d 856 (1964); *People v Chism,* 390 Mich 104, 134; 211 NW2d 193 (1973). There being no contractual evidence that the landlord could give permission to the police to search defendant's apartment, the landlord could not consent to the search of the apartment. Indeed, we note that the landlord testified that he did not consent to the police officers searching defendant's apartment and that the police entered by kicking down the door.

Therefore, the trial court erred in denying defendant's motion to suppress. There is no evidence in the record that defendant, or anyone with authority, consented to the search of the apartment. However, we find that the admission of the evidence at trial, which was very limited evidence (two live shotgun shells and some documents showing that defendant lived at the apartment's address), was harmless error. In other words, we are convinced beyond a reasonable doubt that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. *People v Anderson (After Remand),* 446 Mich 392, 406; 521 NW2d 538 (1994).

Here, there was ample eyewitness testimony that defendant Scott shot the victim. One witness also saw both defendants rummaging through the car and removing items from it. Further, shotgun pellets were recovered near the body of the victim and they matched the shells recovered from defendant's motel room. Under these circumstances, where the improperly seized evidence was very minimal and could not have contributed to defendant's conviction, we find that the error in admitting the two live shotgun shells was harmless beyond a reasonable doubt.

VI

Defendant Scott next argues that his right to confrontation was denied when his codefendant's unredacted police statement was read to the jury and the codefendant subsequently chose not to testify. Defendant claims that this constitutes a violation of *Bruton v United States,* 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). However, a close inspection of the lower court record reveals that there was no violation of *Bruton* in this case.

In *Bruton,* the Supreme Court held that a defendant is deprived of his rights under the Confrontation Clause when the nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. In the present case, during the third day of trial, defense counsel objected to admitting codefendant Collier's police statement as evidence against Scott because the statement directly incriminated Scott as well. However, Collier's counsel stated that Collier was going to testify at trial and would thus be available for cross-examination by Scott. It was not until after this discussion, later the same day, that Collier ultimately decided not to testify. At the time that counsel informed the court that Collier would not testify, Scott did not renew his objection to

the fact that the statement had been admitted. Since the trial court believed that Collier was going to testify at trial at the time that Scott raised his objection to admitting Collier's police statement against him, we cannot conclude that the trial court erred in allowing the police statement at the time the objection was raised.

Moreover, even if we were to consider that a *Bruton* violation occurred in this case, we would find the error to be harmless beyond a reasonable doubt. See *People v Banks*, 438 Mich 408, 427; 475 NW2d 769 (1991). Collier's statement was not admitted until the end of the prosecutor's proofs. Before the statement was admitted, there was ample testimony that Scott had killed the victim. Yolanda Pezzet heard a loud pop and identified defendant as the man standing next to the gray car with a gun in his hand. Three other witnesses, while not positively identifying defendant as the man with the shotgun, all described a man wearing a black trench coat as the shooter. Dean Patton also identified Scott as the man wearing the black trench coat and that Scott had a gun.

Evidence seized from the motel room where the defendants had been staying also confirmed their actions in the killing. The police seized live .410-gauge shotgun shells, and pellets taken from the body of the victim were of the same size and weight as the pellets taken from the live shells found. There was additional testimony from Sue Rucker that she saw Scott with the sawed-off shotgun. Moreover, Scott had told Lisa Campbell that he had been involved in a murder, and he told his girlfriend, Venita Campbell, that he had gotten into some trouble at the airport. Specifically, Venita told the police that Scott had told her that he had to kill a man that he was trying to rob. Venita later retracted this testimony at trial, but she had made this statement to the police.

With respect to the statement itself, this is not a situation where Collier denied all criminal responsibility and shifted all blame onto Scott. In the statement, Collier admitted that he and Scott were out to "take some money from someone." Collier also stated the "Six-Nine" (referring to Scott) "stuck the gun on the man and told him to give him his money." The man attempted to drive off, and Scott shot him. Although Collier squarely places the actual shooting on Scott, there was ample evidence presented by the prosecutor before the statement was admitted that Scott was the shooter. Had the statement never been admitted, there was still overwhelming evidence that Scott was the shooter in this case. Accordingly, we find that there was no *Bruton* violation in this case because the trial court had been informed that Collier was going to testify when Scott objected to the introduction of Collier's police statement. Moreover, even if there was technically a *Bruton* violation, we find that the admission of the statement against Scott was harmless beyond a reasonable doubt because the properly admitted evidence of guilt was overwhelming and the prejudicial effect of the codefendant's statement was so insignificant by comparison.

VIII

Last, defendant Scott argues that his convictions of both felony murder and first-degree murder arising out of the same killing violate the protection against double jeopardy. The prosecutor concedes error and we agree with defendant's contention. The appropriate remedy is to vacate the conviction of felony murder. *People v Passeno,* 195 Mich App 91, 96; 489 NW2d 152 (1992). Accordingly, we remand for the limited purpose of allowing the trial court to amend the judgment of sentence to indicate that defendant Scott's conviction of felony murder is vacated. In all other respects, his convictions of first-degree murder and felony-firearm are affirmed.

Affirmed in Docket No. 184478. In Docket No. 184480, we affirm the convictions of first-degree murder and felony-firearm, vacate the conviction of felony murder, and remand for proceedings consistent with this opinion.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen

APPENDIX B

ORDER

Entered: December 26, 2002

110092

Michigan Supreme Court

Lansing, Michigan

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

SC: 110092

COA: 184480

CLARENCE D. SCOTT

LC: 94-4460

Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Seal

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the forgoing is a true and complete copy of the order entered at the discretion of the Court.

June 29, 1998

Jacqueline B. McKinnon (signed)

Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CLARENCE SCOTT,

Petitioner,

Case No. 99-10274-BC

v. **Honorable David A. Lawson**

BARBARA BOCK,

Respondent.

_____/

OPINION AND ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Clarence Scott, a state prisoner presently incarcerated at the Oaks Correctional Facility in Eastlake, Michigan, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 2254 challenging his conviction for first-degree murder and sentence of life imprisonment. The petitioner alleges, among other things, that his constitutional right to confrontation under the Sixth Amendment was violated when the prosecution introduced the incriminating statement of a co-defendant who later elected not to testify. The Court agrees that the petitioner's

constitutional rights were violated, and finds that the Michigan courts' rejection of this claim was contrary to clearly established federal law as determined by the Supreme Court of the United States. The introduction of the statement was improper and likely had a substantial and injurious effect upon the jury's verdict. Accordingly, the Court will conditionally grant a writ of habeas corpus, and direct the respondent to release the petitioner from custody unless the state retries him within ninety days.

I.

In 1995, a jury in the Recorder's Court for the City of Detroit, Michigan found the petitioner guilty of first-degree premeditated murder, Mich. Comp. Laws §§ 750.316(1)(a), (2) first-degree felony murder, Mich. Comp. Laws §§ 750.316(1)(b), and (3) possession of a firearm during the commission of a felony ("felony firearm"), Mich. Comp. Laws §§ 750.227b. The petitioner was put to trial along with a co-defendant, Isaac Collier, who was also convicted of felony murder. According to the Michigan Court of Appeals, the convictions arose from

> the shooting death of Elwin Lilley on April 2, 1994 near Metro Airport in Romulus[, Michigan]. Defendants attempted to steal money from the victim while he was in his parked car in the parking lot of a McDonald's restaurant. Scott, who had a sawed-off shotgun in the waistband of his pants, put the gun to the victim's head and demanded money. After the victim started his car and attempted to drive away, Scott shot him in the head. Both defendants then took some items from the car. Collier then ran to a gas station and stole a getaway car.

People v Collier, Nos. 184478 & 184480, 1997 Mich. App. Lexis 1327, at*2 (Mich.Ct.App. May 30, 1997). The trial court sentenced the petitioner to two years in prison for the felony firearm conviction and a consecutive term of life imprisonment for the murder convictions. The petitioner has completed his sentence on the felony firearm conviction, and that conviction is not the subject of the present petition. *See Clemons v. Mendez*, 121 F.Supp.2d 1101, 1102-03 (E.D.Mich.2000) ("After a petitioner's sentence for a conviction has completely expired, the collateral consequences of that conviction are insufficient to render him 'in custody' under §§ 2254(a).") (citing *Maleng v. Cook*, 490 U.S. 488, 492, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) (per curiam)).

The Michigan Court of Appeals vacated the petitioner's felony murder conviction on double jeopardy grounds, but affirmed his convictions for first-degree premeditated murder and felony firearm. *See Collier*, 1997 Mich. App. Lexis 1327, at *2 (Mich. App. 1997). The Michigan Supreme Court denied leave to appeal because it was "not persuaded that the questions presented should be reviewed." *People v. Scott*, 458 Mich. 853, 587 N.W.2d 635 (1998).

On August 2, 1999, the petitioner filed this habeas corpus petition pursuant to 28 U.S.C. §§ 2254. The petition alleges four grounds for relief:

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT-APPELLANT'S MOTIONS FOR SEVERANCE AND/OR SEPARATE JURIES.

II. THE COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S PRE-TRIAL MOTION TO SUPPRESS THE FRUITS OF AN ILLEGAL SEARCH.

III. DEFENDANT-APPELLANT'S RIGHT TO CONFRONTATION WAS VIOLATED BY ALLOWING THE CO-DEFENDANT'S STATEMENT TO BE READ TO THE JURY WHEN THE CO-*783 DEFENDANT SUBSEQUENTLY CHOSE NOT TO TESTIFY.

IV. THE TRIAL JUDGE ERRED WHEN SHE DENIED DEFENDANT'S PRE-TRIAL MOTION TO QUASH THE FELONY-MURDER COUNT.

The respondent argues in an answer to the petition filed through counsel that:

1. PETITIONER SHOULD NOT BE ENTITLED TO FEDERAL HABEAS CORPUS RELIEF ON THE BASIS THAT THE TRIAL COURT DENIED HIS MOTION FOR SEVERANCE.

2. WHERE PETITIONER HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS FOURTH AMENDMENT CLAIM IN THE STATE COURTS FEDERAL HABEAS RELIEF IS UNAVAILABLE TO HIM.

3. THE FACT THAT THE CONFESSION OF PETITIONER'S NONTESTIFYING CO-DEFENDANT WAS ADMITTED AT TRIAL SHOULD NOT ENTITLE PETITIONER TO FEDERAL HABEAS RELIEF.

4. PETITIONER'S CLAIM REGARDING THE PRELIMINARY EXAMINATION SHOULD NOT ENTITLE HIM TO FEDERAL HABEAS CORPUS RELIEF.

II.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, altered the standard of review federal courts must apply when reviewing applications for a writ of habeas corpus. The AEDPA applies to all habeas petitions filed after the effective date of the Act, April 24, 1996. *Lindh v. Murphy,* 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Because the petitioner's application was filed after April 24, 1996, the provisions of the AEDPA, including the amended standard of review, apply to this case.

As amended, 28 U.S.C. §§ 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d). Federal courts thus are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *Franklin v. Francis,* 144 F.3d 429, 433 (6th Cir.1998). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. §§ 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State

court shall be presumed to be correct."); *see also Cremeans v. Chapleau,* 62 F.3d 167, 169 (6th Cir.1995) ("We give complete deference *784 to state court findings unless they are clearly erroneous.").

The United States Supreme Court has explained the proper construction of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases.... A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 529 U.S. 362, 405, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

The Supreme Court held that a federal court should invoke the "unreasonable application" clause of §§ 2254(d)(1) and issue the writ "when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." *Id.* at 409, 120 S.Ct. 1495. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable....
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law.... Under §§ 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 409, 410, 411, 120 S.Ct. 1495. *See also Lewis v. Wilkinson,* 307 F.3d 413, 418 (6th Cir.2002).

With these standards in mind, the Court proceeds to the merits of the petition.

III.

A.

1.

The petitioner was tried jointly with his co-defendant, Isaac Collier, Jr. During the State's case-in-chief, and before Collier had made a final decision on whether he would testify in his own defense, the prosecutor called police sergeant Michael Ondejko as a witness. Ondejko had taken a statement from Collier in which Collier implicated himself and the petitioner in the shooting. The petitioner's attorney

had previously moved for separate trials, and when that motion was denied, for separate juries, which motion was likewise denied. Before Ondejko testified, the petitioner's attorney objected to the introduction of Collier's confession, suggesting that the petitioner's confrontation rights would be abridged if Collier changed his mind and decided not to testify. The trial judge overruled that objection, stating, "We'll take that up if Mr. Collier doesn't testify." Trial Tr. III at 61-65.

Several witnesses testified that the petitioner was known as "Six-Nine." *See* Trial Tr. II at 108-09 (Dominic Triola's testimony); *id.* at 132-33 (Lisa Campbell's testimony); Trial Tr. III at 67 (Sue Rucker's testimony); *id.* at 81 (Michelle Swartz's testimony as read from the preliminary examination transcript). Thereafter, Sergeant Ondejko read Collier's confession to the jury, including the following:

> Saturday morning I woke up....
>
> I counted my money. I had $365.00. I was short about$275.00. I discussed it with some other people, Dominic, and asked if he could help me out with some money. He said he would if he had it, but he didn't have it.
>
> I went back to the room and discussed it with Six-Nine. He said if you get a ride, ... we'll go get some money some way. So Dominic let me use the car because he knew I would repay him.

We drove out towards the airport and we circled around the Comfort Inn. We were planning to take some money from someone. There was no one around. so I drove over to McDonald's parking lot, circled around one time, and there was a car parked at the back of the building.

Six-Nine said, 'Back up to that car.' The man was backed in also. He was reading the newspaper. Six-Nine got out of the car and stuck the gun on the man and told him to give him his money.

The man resisted and he started tapping the gun out at his face. Then he started the car and tried to drive off. Six-Nine shot him. The car sped up into a pole and came backwards.

At this time I tried to take off and the car hit our car and our car shut off. The car we were in has to be pushed [to] start, so immediately I ... got out and ran, and Six-Nine was already out and he ran also. He ran towards the highway. I ran to the gas station looking for a running car.

There was a woman getting out from her car, and as she opened the door, I approached her and asked for her keys. She gave them to me and she asked for her purse. I let her get it, and then I took off towards the highway.

There was a red light. I hesitated, then I ran the red light heading towards the highway. I saw Six-Nine on a ramp or hill and stopped the car and waited for him. He got in and I said, 'Throw that damn gun away,' and he wouldn't do it.

We headed east on I-94....

We headed over [to] Six-Nine's girlfriend's house. He got out to tell her to lie for him. I'm not sure what he told her.

From there we went to my uncle's house.... My Uncle Dillard came over while we were there, and he was aware we had a stolen car, not knowing what else happened. He took me and Shelly and Six-Nine over [to] his house. I put the car in the garage....

Trial Tr. III at 139-43.

The following questions were asked and answered after Collier wrote his confession:

Q. [Sergeant Ondejko] What was the date?

A. [Isaac Collier] April 2nd.

. . . . .

Q. How were you and Six-Nine going to "get some money?"

A. Rob or take some money from someone.

. . . . .

Q. What was Six-Nine wearing on that day?

A. Black long trench coat, black pants and T-shirt.

. . . .

Q. Describe the gun.

A. Sawed-off shotgun, one shot, 410 gauge.

Q. Did you have a gun?

A. No.

Q. Have you ever been threatened to give your statement?

A. No.

Q. Have you been made any promises?

A. No.

Id. at 144-45.

The trial court did not limit the purpose for which this evidence was offered. For instance, the jury was not informed that the statement was admissible only as to Collier, or that it

could not be considered as substantive evidence of the petitioner's guilt. Rather, the trial court told the jury:

> Now, I want to talk to you about the statement made by Isaac Collier to the police, as the People have introduced that statement here, and you can't consider that statement--what we call an out of court statement--unless you do the following:
>
> First, you decide the defendant, Isaac Collier, actually made the statement as it was given to you. If you find that he did not make the statement at all, you shouldn't consider it.
>
> If you find he made part of the statement, you may consider that part as evidence.
>
> If you find that Isaac Collier did make the statement, you must decide whether the whole statement or part of it is true. When you think about whether the statement is true, you should consider how and when the statement was made, as well as all the other evidence in the case.
>
> You may give the statement whatever importance you think it deserves. You may decide that it was very important or not very important at all. In deciding this, you should once again think about how and when the statement was made, and about all the other evidence in the case.

Trial Tr. IV at 80-81.

After the prosecutor rested, neither defendant testified nor presented any witnesses.

The petitioner now contends, as he did in state court, that he was deprived of his right of confrontation when Collier's confession was read to the jury without an opportunity to cross-examine him. The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause is applicable to the States through the Fourteenth Amendment. *Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). The purpose of the Confrontation Clause was to "constitutionalize" certain common-law testimonial guarantees by which an accused could test a witness' perception, memory, ability to relate or communicate, and, perhaps most importantly, sincerity. *See United States v. Chapin*, 231 F.Supp.2d 600, 606 (E.D.Mich.2002).

> The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-243, 15 S.Ct. 337, 39 L.Ed. 409 (1895). Those testimonial guarantees thus included the oath, a witness' personal appearance before the fact finder, and cross-examination. As the Supreme Court summarized succinctly in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970):

> Confrontation: (1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth" [5 J. Wigmore, *Evidence* §§ 1367, at 32 (J. Chadbourn rev.1974)]; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158, 90 S.Ct. 1930 (footnote omitted).

In *Bruton v. United States*, 391 U.S. 123, 126, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Supreme Court held that the admission of a nontestifying co-defendant's confession at a joint trial violated the petitioner's right of confrontation despite the jury being instructed that the co-defendant's confession could not be used to determine the petitioner's guilt or innocence. The Court held that the prejudice that may result from a co-defendant's confession "cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice." *Id.* at 132, 88 S.Ct. 1620 (internal quotation marks and citations omitted).

The Supreme Court has consistently held that "a non-testifying co-defendant's statements that implicate a defendant are presumptively unreliable and their admission violates the Confrontation Clause." *Calvert v. Wilson*, 288 F.3d 823, 828 (6th Cir.2002) (citing *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965)). For instance, in *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), the Supreme Court explained:

> As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.

Id. at 545, 106 S.Ct. 2056. The Court held that admitting a non-testifying accomplice's confession to convict the defendant in that case violated the Confrontation Clause. In *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), the Supreme Court held that such statements do not fall within a firmly rooted exception to the hearsay rule, and thus cannot satisfy the Confrontation Clause unless they are supported by particularized guarantees of trustworthiness. *Id.* at 134, 119 S.Ct. 1887. Those indicia of reliability must be inherent in the statement itself and the circumstances under which it is made, without reference to corroborating or other evidence at trial. *See Idaho v. Wright*, 497 U.S. 805, 822, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). However, the Court offered a "cogent reminder" concerning evidence of this nature:

> It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice--that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

Lilly, 527 U.S. at 137, 119 S.Ct. 1887.

The Michigan Court of Appeals did not analyze the claim of error in admitting Collier's confession under the Lee v. Illinois line of cases. It concluded on review of the petitioner's claim that there was no *Bruton* error in this case, not because Collier's statement was particularly reliable, but because the trial judge was apparently misled by Collier's intention to testify at trial. *See Collier*, 1997 Mich. App. Lexis 1327, at *18. Collier's later decision not to testify, the court found, did not render the trial court's original determination erroneous or mean that the petitioner's rights had been violated.

The state court of appeals' holding is contrary to clearly established federal law as determined by the Supreme Court in *Lee* and *Lilly*, and is an unreasonable application of *Bruton* and its progeny. *See* 28 U.S.C. §§ 2254(d)(1). Collier's statement, although implicating himself in the criminal transaction, blamed the petitioner for the actual shooting, and it contained no particularized guarantees of trustworthiness. It was constitutionally inadmissible as substantive evidence of the petitioner's guilt, as were the accomplices' statements in *Lee*, *Lilly*, and *Gray v. Maryland*,

523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998). The petitioner's rights were violated because he could not subject Collier's statement to adversarial testing. Under *Bruton,* in which an instruction limiting the use of the accomplice's statement was given, an accused's Confrontation Clause rights were not dependent on the shifting testimonial intentions of a co-defendant at trial. Rather, the constitutional right of confrontation belongs to the petitioner, not the trial judge or the petitioner's co-defendant. As the Tenth Circuit has explained, the Supreme Court's *Bruton* jurisprudence makes it clear that a prosecutor who introduces a pretrial statement of a co-defendant which incriminates a defendant risks a mistrial--or a reversal--if the co-defendant decides not to testify:

> Of course, there will be future cases in which a codefendant like Lux unpredictably decides, for a variety of tactical reasons, not to take the stand after initially indicating otherwise. This is the right of any codefendant. In *Richardson,* the Supreme Court suggested that the inconveniences that these unpredictable defendants produce is the price that we must pay for the continued adherence to *Bruton. See Richardson,* 481 U.S. at 209, 107 S.Ct. 1702 (stating that it is not always possible to assure compliance with *Bruton ex ante*). The Court has noted that the price we must pay is comparatively small: "[By not following the rule adopted in *Bruton*] [w]e secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high."

Bruton, 391 U.S. at 135, 88 S.Ct. 1620 (quoting *People v. Fisher*, 249 N.Y. 419, 164 N.E. 336, 341 (1928) (Lehman, J., dissenting)).

United States v. Hill, 901 F.2d 880, 884 (10th Cir.1990) (footnote and parallel citations omitted).

In this case, the petitioner was unable to cross-examine Collier about his confession because Collier exercised his constitutional right not to testify. The confession implicated the petitioner and identified him, at least by his nickname. The use of nicknames rather than the petitioner's proper name does not lessen the *Bruton* violation. *See Gray*, 523 U.S. at 195-96, 118 S.Ct. 1151. Collier's confession was not redacted to eliminate any reference to the petitioner. *Cf. Richardson*, 481 U.S. at 211, 107 S.Ct. 1702 (holding "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when ... the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence").

The petitioner offered the trial judge practical alternatives to the risky practice of relying on the co-defendant's ambiguous intention to testify: severance or separate juries. The petitioner also interposed a timely objection to the introduction of Collier's statement. The trial judge's "cross-that-bridge-when-we-come-to-it" approach was ineffective to protect the petitioner's Sixth Amendment rights, however, when the Rubicon was crossed and the bridge was burned by Collier's failure to testify.

The state court of appeals mentioned that defense counsel "did not renew his objection to the fact that the statement had been admitted," although its decision did not turn on that point. It is not clear under Michigan law that renewing the objection was procedurally necessary, *see* Mich. R. Evid. 103 (rev.2002) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."), and there is certainly no clear indication that the appellate court's judgment rested on a state procedural bar. *See Harris v. Reed,* 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (holding that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar") (citation omitted).

The petitioner has made the showing required by 28 U.S.C. §§ 2254(d)(1) because the decision of the Michigan Court of Appeals--that no *Bruton* error occurred because the petitioner's rights under the Confrontation Clause were subordinate to the whims of his co-defendant--was an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. Moreover, since no limiting instruction was given at trial, the jury was allowed to consider the co-defendant's confession as substantive evidence of the petitioner's guilt, an aspect of the Confrontation Clause not addressed by the state appellate court, but nonetheless contrary to *Lee* and its progeny. By allowing evidence in circumstances clearly at odds with Supreme Court precedent, the decision of the court of appeals was "contrary to" federal law as established by the Supreme Court. *See Williams,* 529 U.S. at 405-06, 120 S.Ct. 1495.

The Michigan Court of Appeals concluded that, even if there was a technical violation of *Bruton*, it "would find the error to be harmless beyond a reasonable doubt." *Collier*, No. 184480, 1997 Mich. App. Lexis 1327, at *16. The court reached that conclusion because, in its opinion, "the properly admitted evidence of guilt was overwhelming and the prejudicial effect of the codefendant's statement was so insignificant by comparison." *Id.* at *18-19.

Although not citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the state court articulated the rule set forth by the Supreme Court which the states must apply on direct review when evaluating the effect of non-structural constitutional error in criminal proceedings. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at *24. Indeed, the erroneous admission of a co-defendant's confession at a joint trial is the sort of non-structural error that is subject to harmless error analysis. *Schneble v. Florida*, 405 U.S. 427, 430, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

This Court does not agree that the state appellate court properly applied the *Chapman* standard. But federal courts on habeas review must apply the "less strict ... measure of harmlessness" set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). *O'Neal v. McAninch*, 513 U.S. 432, 438, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). The *Brecht* test "for determining whether habeas relief must be granted is whether the ... error 'had substantial and injurious effect or influence in determining the

jury's verdict.' " *Brecht,* 507 U.S. at 623, 113 S.Ct. 1710 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). The Sixth Circuit has held that the *Brecht* test survived the amendments to 28 U.S.C. §§ 2254 enacted by the AEDPA. *See Nevers v. Killinger,* 169 F.3d 352, 371 (6th Cir.1999). A federal court need not specifically analyze whether the state's application of the *Chapman* test constitutes an unreasonable application of federal law under 28 U.S.C. §§ 2254(d)(2), however, since a "petitioner [who] is able to make [the *Brecht*] showing ... will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt was outside the realm of plausible credible outcomes, and therefore resulted from an unreasonable application of *Chapman.*" *Barker v. Yukins,* 199 F.3d 867, 872 (6th Cir.1999) (citing *Nevers,* 169 F.3d at 371-72). In other words, the "unreasonable application" test promulgated by the AEDPA is subsumed by the *Brecht* analysis.

The *Brecht* test requires the court to assess the impact of the constitutional error on the jury's decision. It requires an analysis which is different than simply measuring the sufficiency of the evidence after subtracting the offending item. As the Sixth Circuit explained: "The *Brecht* test does not say 'only errors that turn acquittals into convictions are harmful.' As Justice Stevens put it in *Brecht,* 'the question is not "were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." ' " *Kyger v. Carlton,* 146 F.3d 374, 382 (6th Cir.1998) (quoting *Brecht,* 507 U.S. at 642-43, 113 S.Ct. 1710 (Stevens, J., concurring)). "[I]t is improper in a *Brecht* inquiry to focus on the sufficiency of the untainted evidence." *Ibid.*

The Michigan Court of Appeals summarized the evidence in this case as follows:

> Before [Collier's] statement was admitted, there was ample testimony that Scott had killed the victim. Yolanda Pezz[a]t heard a loud pop and identified defendant as the man standing next to the gray car with a gun in his hand. Three other witnesses, while not positively identifying defendant as the man with the shotgun, all described a man wearing a black trench coat as the shooter. Dean Patton also identified Scott as the man wearing the black trench coat and that Scott had a gun.
>
> Evidence seized from the motel room where the defendants had been staying also confirmed their actions in the killing. The police seized live .410-gauge shotgun shells, and pellets taken from the body of the victim were of the same size and weight as the pellets taken from the live shells found. There was additional testimony from Sue Rucker that she saw Scott with the sawed-off shotgun. Moreover, Scott had told Lisa Campbell that he had been involved in a murder, and he told his girlfriend, Venita Campbell, that he had gotten into some trouble at the airport. Specifically, Venita told the police that Scott had told her that he had to kill a man that he was trying to rob. Venita later retracted this testimony at trial, but she had made this statement to the police.

> With respect to the statement itself, this is not a situation where Collier denied all criminal responsibility and shifted all blame onto Scott. In the statement, Collier admitted that he and Scott were out to "take some money from someone." Collier also stated th[at] "Six-Nine" (referring to Scott) "stuck the gun on the man and told him to give him his money." The man attempted to drive off, and Scott shot him. Although Collier squarely places the actual shooting on Scott, there was ample evidence presented by the prosecutor before the statement was admitted that Scott was the shooter. Had the statement never been admitted, there was still overwhelming evidence that Scott was the shooter in this case.

Collier, 1997 Mich. App. Lexis 1327, at *17-18.

Additionally, Michelle Swartz's testimony from the preliminary examination was read into the record because she could not be located. Swartz testified at the preliminary examination that, on the day of the murder, Collier had said "Six-Nine" (the petitioner) shot somebody. *See* Trial Tr. III at 92.

The record supports the state court's summation of the evidence in many aspects. Yolanda Pezzat did identify the petitioner as the man who pointed a long gun at the driver's side of the victim's car. *See* Trial Tr. II at 17-26. And Dean Patton did identify the petitioner as the man who put a gun in his waistband, went to the victim's car, pulled out the gun, put his arm in the car, and moved his arm back and forth. *See id.* at 67-73.

However, the state court's finding that "[t]hree other witnesses, while not positively identifying [the petitioner] as the man with the shotgun, all described a man wearing a black trench coat as the shooter" is an unreasonable determination of the facts. None of the eyewitnesses for the State saw the actual shooting. Yolanda Pezzat and Dean Patton specifically testified that they did not see the shooting. *See id.* at 32 and 98. And although Benjamin Pezzat saw someone in a black trench coat pointing a gun at a man in the victim's car, he was unable to identify the petitioner and he did not testify about a shooting. *See id.* at 36-42.

Roger Nohouig testified that one of two men who tried to push the victim's car and then fled on foot wore a black trench coat, but Nohouig was unable to identify the petitioner and he did not see anyone with a gun. *See id.* at 43-50. Nancy Vojakovic identified the petitioner at trial as one of two men who ran past her van after the victim's car hit the McDonald's restaurant. She did not see an object in either man's hands. *See id.* at 52-61. Roberto Gonzalez saw a man in a black trench coat, but he saw him at the gas station next to the McDonald's restaurant from where Collier stole the getaway car, and he did not identify the petitioner as the man. *See id.* at 63-66.

Furthermore, Lisa Campbell testified on cross-examination that the petitioner had a history of bragging about his involvement in violent events and the bragging was never true. *See id.* at 132-38. Venita Campbell testified that the police had threatened to take her children if she did not say the petitioner was involved in the murder, *see id.* at 143-44 and 156-71, although a police officer denied that allegation. *See* Trial Tr. III at 39-40.

The quantum of evidence is a pertinent factor in pursuing the appropriate inquiry under *Brecht*, but the Court must also examine the nature of the evidence. Absent Collier's confession, the nature of the State's case against the petitioner was largely circumstantial. However, if the jurors chose to believe Collier's confession, there was no need to draw any inferences in order to conclude that the petitioner was the shooter, or that he planned the robbery. *See Calvert*, 288 F.3d at 835 ("With the admission of [the co-defendant's] statement, the jury had no need to engage in any inferences at all.") The confession was not cumulative evidence; rather, it tied the evidence together and clinched the case for the prosecution. It provided the only direct evidence that: (1) Collier and the petitioner planned a robbery; (2) the petitioner ordered Collier to back up to Lilley's car; (3) the petitioner demanded money from Lilley while pointing a gun at him; (4) when Lilley resisted, the petitioner or Lilley tapped the gun; and (5) the petitioner shot the victim as he tried to drive away.

The confession likely had a substantial effect in persuading the jury to find the petitioner guilty of first-degree premeditated murder in addition to felony murder. A person commits first-degree murder under Michigan law when intentionally killing another "by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing," Mich. Comp. Laws §§ 750.316(1)(a), or by perpetrating a murder in the course of certain felonies, such as robbery. Mich. Comp. Laws §§ 750.316(1)(b). The defendant was convicted under both of these provisions, but the felony murder conviction was vacated by the court of appeals, leaving only the conviction for first-degree premeditated murder for this Court to review in this habeas proceeding. In order for one to be convicted of murder involving premeditation and deliberation, the defendant "must have sufficient time to take a second look" at his decision to

kill. *People v. Edwards,* 139 Mich.App. 711, 719, 362 N.W.2d 775, 779 (1984). "One cannot instantaneously premeditate a murder" in Michigan, and while premeditation and deliberation can be inferred from the circumstances of the homicide. they cannot be the product of speculation. *People v. Plummer,* 229 Mich App 293, 301, 305, 581 N.W.2d 753, 757, 759 (1998). Although first-degree *felony* murder could arguably be inferred from the circumstances surrounding the homicide, without Collier's untested confession the jury in this case would have had little basis for concluding that the homicide was the result of premeditation and deliberation. Rather, the facts are consistent with a case of a robbery gone wrong.

With these considerations in mind, the Court concludes that the *Bruton* error was not harmless. It likely had a substantial and injurious effect on the jury's verdict and resulted in actual prejudice under the test adopted in *Brecht.* Therefore, the state court's finding of harmless error was an unreasonable application of *Chapman,* and the petitioner is entitled to habeas corpus relief on the basis of his *Bruton* claim.

B.

The remaining claims are easily dispatched. The petitioner's claim that the trial court improperly declined to sever his trial from that of Collier is rendered moot by the Court's grant of habeas relief for the *Bruton* violation that occurred when the two defendants were tried together and Collier's confession was received in evidence.

The search and seizure claim is barred by the Supreme Court's decision in *Stone v. Powell*, 428 U.S. 465, 481-82, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), because the State provided the petitioner a full and fair opportunity to litigate his Fourth Amendment claim in the Michigan state courts. Specifically, the petitioner raised his Fourth Amendment claim in the trial court, which held an evidentiary hearing; the Michigan Court of Appeals addressed his claim on the merits; and the Michigan Supreme Court which denied leave to appeal.

Finally, the petitioner's claim that the trial court erroneously failed to quash the felony murder count does not warrant habeas relief. The petitioner contends that, with the exception of Isaac Collier's confession, there was no evidence presented at the preliminary examination to support the felony murder charge, and he should not have been bound over to circuit court on the charge of felony murder. However, the Michigan Court of Appeals vacated the petitioner's felony murder conviction, essentially rendering the issue moot. Furthermore, the petitioner had no right to a preliminary examination. *Gerstein v. Pugh*, 420 U.S. 103, 123, and 125 n. 26, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Dillard v. Bomar*, 342 F.2d 789, 790 (6th Cir.1965). To the extent that the petitioner believes that the trial court violated Michigan state law in denying him a preliminary hearing, that claim is not cognizable on federal habeas review. *See Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

IV.

The trial court violated the petitioner's constitutional rights by allowing in evidence the pretrial statement of a nontestifying co-defendant that incriminated the petitioner. The decision of the Michigan Court of Appeals concluding otherwise was contrary to federal law established by the Supreme Court of the United States, and the constitutional error had a substantial and injurious effect on the jury's verdict.

Accordingly, it is **ORDERED** that a writ of habeas corpus is **CONDITIONALLY GRANTED**.

It is further **ORDERED** that the respondent shall release the petitioner from custody unless the State brings him to trial within ninety days.

DAVID M. LAWSON
United States District Judge

Dated: January 17, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CLARENCE SCOTT,

Petitioner,

Case No. 99-10274-BC

v. **Honorable David A. Lawson**

BARBARA BOCK,

Respondent.

_____/

JUDGMENT

In accordance with the Opinion and Order entered on this date,

It is **ORDERED AND ADJUDGED** that the Petition For Writ of Habeas Corpus is **CONDITIONALLY GRANTED.**

It is further **ORDERED AND ADJUDGED** that the petitioner's conviction for first-degree murder, contrary to Mich. Comp. Laws §§ 750.316(1)(a), is **VACATED.**

It is further **ORDERED AND ADJUDGED** that the respondent shall release the petitioner from custody unless the State brings him to trial within ninety days.

It is further **ORDERED AND ADJUDGED** that the respondent shall release the petitioner from custody unless the State brings him to trial within ninety days.

DAVID M. LAWSON
United States District Judge

Dated: January 17, 2003

APPENDIX D

No. 03-1168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARENCE SCOTT,
Petitioner-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF MICHIGAN

v.

DAVID GUNDY, Warden,
Respondent-Appellant.

Before SUHRHEINRICH, GIBBONS and SUTTON, Circuit Judges.

SUTTON, Circuit Judge. Clarence Scott filed a petition for a writ of habeas corpus challenging his state-court first-degree murder conviction, for which he currently is serving a life sentence. He alleges that the admission of his co-defendant's confession, which implicated Scott in the murder, violated his rights under the Confrontation Clause. The district court agreed, holding that a constitutional violation occurred, that the error was not harmless under *Brecht v. Abrahamson*. 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and that the writ should be granted conditionally. We affirm.

I.

On April 2, 1994, Elwin Lilley drove to the Detroit airport to pick up his mother from an arriving plane. He arrived early and waited in his car in a parking lot adjacent to a McDonald's restaurant near the airport. While sitting in his car, he was shot and killed after what appears to have been a botched robbery attempt.

On May 4, 1994, the State of Michigan charged Clarence Scott and Isaac Collier with responsibility for the Lilley murder. A grand jury indicted Scott for (1) first-degree premeditated murder, (2) felony murder and (3) possession of a firearm during the commission of a felony. And a grand jury indicted Isaac Collier for (1) first-degree premeditated murder, (2) felony murder and (3) unarmed robbery.

In 1995, in the Recorder's Court of the City of Detroit, Michigan, the State tried Scott (also known as "Six-Nine") and Collier on each of these charges in a joint jury trial. Shortly before trial. Scott moved to sever the two mens' trials or at a minimum to empanel separate juries. The trial court rejected the motion.

Scott then moved to exclude a written confession given by Collier to police that implicated Scott in the shooting. On the morning of April 2nd, according to the confession. Collier and Scott borrowed a car from an acquaintance and drove toward the Detroit airport in search of a robbery prospect. After their first stop at a hotel proved unsuccessful, they drove to a nearby McDonald's. Once in the parking lot of the restaurant. Scott told Collier to back up

next to one of the cars in the lot; after Collier did so, Scott got out of the car and "stuck the gun on the man [in the car] and told him to give him his money. The man resisted and he [Scott] started tapping the gun out at his face. Then [the victim] started the car and tried to drive off. Six-Nine shot him." JA 319--20.

Scott argued that the admission of Collier's statement would violate his rights under the Confrontation Clause. The court noted that Collier still intended to testify and thus would be available for cross-examination. When Scott countered that Collier could change his mind, JA 255 ("[I]f [the witness] is able to read the statement, then Mr. Collier at the last minute decides not to testify .... we can't unwring this thing."), the court responded that it would "take that up if Mr. Collier doesn't testify," JA 256. Collier indeed changed his mind, he did not testify and the court never reconsidered the Confrontation Clause issue even though the State was permitted to introduce Collier's statement through Sergeant Michael Ondejko. Neither the jury instructions nor any other guidance from the court limited the impact of the confession on the jury's deliberations.

Aside from Collier's confession, no other evidence at trial directly showed that Scott shot Lilley. Considerable circumstantial evidence, however, supported the State's theory of the case. Yolanda Pezzat, who was in her car at the McDonald's parking lot at the time of the shooting, came closest to observing what happened. She turned around just after hearing the gunshot and saw a man in a long trench coat, whom she later identified as Scott, still pointing a gun of about a foot's length at the driver's side window of the victim's car. Other witnesses, after hearing the gunshot, saw

the victim's car lurch forward and hit the McDonald's, then roll back into a black Ford Escort (consistent with the type of car that Collier and Scott had borrowed); they saw two black males, one of whom wore a long trench coat and whom they later identified as Scott, first unsuccessfully trying to push the victim's car off the Escort, then removing items from the two cars before fleeing. Other witnesses observed Scott in possession of a shotgun at various points on the day of the murder: Sue Rucker testified that she saw Scott with his sawed-off shotgun that morning, while Dean Patton saw Scott in the moments after the shooting placing the weapon in the waistband of his pants under his trench coat. And according to Michelle Swartz, Collier told her later that day that Scott had shot someone.

The jury convicted Scott of all three charges--first-degree premeditated murder, felony murder and possession of a firearm during the commission of a felony--and convicted Collier of felony murder. The trial court sentenced Scott to two years' imprisonment for the felony firearm conviction (which he has served) and to consecutive life sentences for the two murder convictions. On direct appeal, the Michigan Court of Appeals affirmed his premeditated murder conviction. The court rejected his Confrontation Clause challenge on two grounds--that Scott failed to renew his objection to the admission of the confession when Collier decided not to testify and that any constitutional error in admitting the confession was harmless. *People v. Collier*, Nos. 184478 & 184480, 1997 WL 33347912, at *6 (Mich.Ct.App. May 30, 1997). The appeals court vacated Scott's felony murder conviction, however, determining that his convictions for "both felony murder and first-degree murder arising out of the same killing violate the protection

against double jeopardy." *Id.* at *7. The Michigan Supreme Court denied leave to appeal. *People v. Scott*, No. 110092, 587 N.W.2d 635 (Mich. June 29, 1998). Today, Scott remains in prison solely as a result of his first-degree premeditated murder conviction.

On July 26, 1999, Scott filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. His petition identified four theories of relief, only one of which remains in the case--the Confrontation Clause claim.

The district court rejected the State's argument that Scott had procedurally defaulted his Confrontation Clause claim by failing to renew his objection when Collier decided not to testify. It also held that the admission of the confession without an opportunity to cross-examine Collier constituted an unreasonable application of clearly-established federal law. *See* 28 U.S.C. §§ 2254(d)(1). The prejudice that results from the confession, the district court reasoned, "cannot be dispelled by cross-examination if the co-defendant does not take the stand." *Scott v. Bock*, 241 F.Supp.2d 780, 787 (E.D.Mich.2003) (quoting *Bruton v. United States*, 391 U.S. 123, 132, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)) (internal quotation marks and citations omitted).

Turning to the impact of the error on the trial, the district court determined that it "likely had a substantial and injurious effect on the jury's verdict," *id.* at 792 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 622, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)), because the State's case relied on "circumstantial" evidence in the absence of the confession, *id.* In the district court's view, the confession provided "the only

direct evidence that: (1) Collier and the petitioner planned a robbery: (2) the petitioner ordered Collier to back up to Lilley's car; (3) the petitioner demanded money from Lilley while pointing a gun at him; (4) when Lilley resisted, the petitioner or Lilley tapped the gun; and (5) the petitioner shot the victim as he tried to drive away." *Id.* Because the confession "tied the evidence together and clinched the case for the prosecution," the court concluded, the constitutional error was not harmless. *Id.*

II.

As this case comes to us, the scope of debate between the parties has narrowed considerably. The State concedes that the district court correctly rejected its procedural default argument because the state appellate court did not "clearly and expressly" rely on it in rejecting Scott's constitutional claim. *See Harris v. Reed,* 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Frazier v. Huffman,* 343 F.3d 780, 791 (6th Cir.2003). The State also concedes that the district court correctly decided that the state court unreasonably applied the Supreme Court's precedents interpreting the Confrontation Clause--a concession made all the wiser by a recent decision of the Court. *See Crawford v. Washington,* --- U.S. ----, ----, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004) (holding that "[w]here testimonial evidence is at issue [ ] the Sixth Amendment demands ... unavailability and a prior opportunity for cross-examination" and overruling *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), which had permitted testimonial statements without cross-examination if they bore sufficient "indicia of reliability").

And one of the primary arguments pressed on appeal, the State also concedes, may not be considered fully by a three-judge panel of this Court. The State argues that the *Brecht* "substantial and injurious effect" harmless-error standard did not survive the passage of The Antiterrorism and Effective Death Penalty Act (AEDPA). Pub.L. No. 104-132, 110 Stat. 1214 (1996). Instead, the State contends, federal courts must view a state court's harmless error ruling through the lens of AEDPA and ask whether the state court's application of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)--requiring the error to be harmless beyond a reasonable doubt--was "unreasonable" under 28 U.S.C. §§ 2254(d)(1). Our Court, however, has already rejected this argument and as a result continues to view *Brecht* as the proper yardstick for measuring these claims. *See Nevers v. Killinger*, 169 F.3d 352, 371 (6th Cir.1999) (noting that "the amendments to §§ 2254(d) [AEDPA] do not vitiate in any way the premise set out in *Brecht*"); *see also Hill v. Hofbauer*, 337 F.3d 706, 718 (6th Cir.2003) ("The *Brecht* standard has survived the enactment of [ ] AEDPA."); *Bulls v. Jones*, 274 F.3d 329, 335 (6th Cir.2001).

Conceding that one panel of this Court generally may not overrule the decision of another panel, the State argues that two intervening Supreme Court decisions permit us to overrule *Nevers*. Yet the two cases, *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003), and *Woodford v. Visciotti*, 537 U.S. 19, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002), merely explain the meaning of an "unreasonable application of clearly established federal law." Neither one specifically addresses the issue of harmless error, much less holds that *Brecht* did not survive the passage of AEDPA. *See Lockyer*, 538 U.S. at 77, 123 S.Ct. 1166 (deciding that state court did not unreasonably apply Supreme

Court precedent by affirming shoplifter's two consecutive 25 years-to-life sentences); *Woodford*, 537 U.S. at 25, 123 S.Ct. 357 (determining that a federal appeals court did not abide by the terms of §§ 2254(d)(1) when it substituted its own judgment for that of the state court in assessing petitioner's ineffective assistance of counsel claim). Since the Supreme Court issued both of these decisions, this Court has continued to adhere to *Nevers* and its requirement that we apply the *Brecht* standard. *See Hill*, 337 F.3d at 718 (post-*Lockyer* and post-*Woodford* case identifying *Brecht* as the appropriate harmless error standard for habeas cases).

III.

The only remaining question--and the only serious question on appeal--is whether the unconstitutional admission of the Collier confession amounted to harmless error under *Brecht*. We agree with the district court that it did not.

Brecht requires federal courts to review the state trial court record to determine whether the erroneously-admitted evidence (here, Collier's confession) likely had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623, 113 S.Ct. 1710 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). The *Brecht* test, we are told, is not one of "actual prejudice," which is to say it is not a test that asks us to look at the evidence, subtract out the confession, then determine whether the properly-admitted evidence suffices to convict. *See O'Neal v. McAninch*, 513 U.S. 432, 438--39, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) (noting that *Brecht* is not controlling to the extent it requires a petitioner to establish "actual prejudice"); *see also Kotteakos*, 328 U.S. at 764--65, 66 S.Ct. 1239 (stating that the proper inquiry under the federal harmless error review statute is not whether the jurors "were [ ] right in their judgment" or whether "there

was enough to support the result, apart from the phase affected by the error"); *Caldwell v. Bell,* 288 F.3d 838. 842--43 (6th Cir.2002). Rather, the question is whether "the error itself had substantial influence" on the verdict even if the evidence otherwise supported the verdict, and "[i]f so, or if one is left in grave doubt, the conviction cannot stand." *Caldwell,* 288 F.3d at 842.

The admission of Collier's confession potentially had a "substantial and injurious effect" on the verdict in two ways--identification and premeditation. As to identification, we agree with the State (and disagree with the district court) that the evidence connecting Scott to the shooting, even without Collier's confession, was so considerable as to make the possibility that the confession would undermine the essential fairness of the jury's deliberations quite improbable. Acquaintances of Scott saw him wearing a long black trench coat and in possession of a sawed-off shotgun both before and after the murder. Immediately after she heard the gunshot, Yolanda Pezzat saw a man wearing a black trench coat (whom she later identified as Scott) pointing a gun toward the driver's side of the victim's car. Dean Patton saw the man in the trench coat (whom he too identified as Scott) placing the shotgun inside his waistband und[illegible]coat in the moments following the murder as he ran back and forth between the victim's car and his own car. And Michelle Swartz, Collier's girlfriend, testified that Collier told her later that day that Scott had shot someone. Even if one characterizes this testimony as circumstantial evidence (which it was) and even if one characterizes the Collier confession as direct evidence (which it was), the circumstantial evidence was so overwhelming as to make immaterial the risk that the admission of the Collier confession would have a "substantial and injurious effect" on the jury's deliberations over identification.

Premeditation is a different matter. While the State presented overwhelming admissible evidence of the shooter's identity, it presented little admissible evidence on premeditation--the key element distinguishing first-degree premeditated murder under Michigan law from felony murder or second-degree murder. In addition to the confession, the State presented only one other material piece of evidence regarding premeditation. The medical examiner testified that the gun was no more than six inches from the victim's face when it was fired, and the car window between Scott and Lilley was three-quarters of the way rolled up and unshattered by the shooting--suggesting that Scott must have taken enough care to stick his weapon through the open top of the window to point it at Lilley.

Michigan law, it is true, permits jurors to draw an inference of premeditation from the surrounding circumstances of a murder, including inferences from the weapon used and the location of the victim's wounds. *See People v. Plummer*, 229 Mich.App. 293, 581 N.W.2d 753, 757 (1998). So in this sense, the medical examiner's testimony was quite relevant and by itself might well have sufficed to convict Scott and establish premeditation in the process. But the likelihood that the jurors would have accepted the chain of inferences that this circumstantial evidence required had they not heard Collier's confession requires considerable faith in the State's case, and indeed more faith than *Brecht* allows. *See Bulls*, 274 F.3d at 337 (determining that the illegal admission of a co-defendant's confession had a "substantial and injurious influence in determining the jury's verdict" because the co-defendant's statement "obviated the need for the jury to infer anything, and directly supplied evidence of the disputed element of malice"); *Calvert v. Wilson*, 288 F.3d 823, 835 (6th Cir.2002)

("With the [unconstitutional] admission of [the co-defendant's] statement, the jury had no need to engage in any inferences at all.... We must conclude, therefore, that the admission of [the] statement had a substantial and injurious influence in determining the jury's verdict.").

Consider the differences between the State's evidence of premeditation with and without the confession. With the confession, the State could show that Collier and Scott planned to rob someone, that Scott instructed Collier to back the car up to the victim's car, that Scott pointed the shotgun at the victim and demanded his money, that Scott tapped the gun on the victim's face and, when Lilley resisted, that "Six-Nine shot him." Without the confession, the State could show (through the medical examiner's testimony) that the shooting occurred at close range and that Scott managed to point the gun through a relatively narrow opening in the window of the victim's car.

The difference between these two evidentiary settings assuredly would have had a significant impact on a jury's deliberations over premeditation. Collier's statement that "Six-Nine shot him," along with other parts of the confession, ruled out the possibility that the gun fired accidentally when the victim refused to hand over his money. Without Collier's confession, the record also would have contained little evidence of a "second look" or moment of deliberation as required for premeditation under Michigan law. *See People v. Glover,* 154 Mich.App. 22, 397 N.W.2d 199, 202--03 (1986); *see also Hill,* 337 F.3d at 720 (*Brecht* satisfied where co-defendant's wrongly-admitted confession supplied the only evidence that the defendant knew that his cohort had a weapon, which under state law satisfied the intent element for aiding and abetting a murder).

The prosecution's use of the confession during the trial bolsters this conclusion. The prosecutor relied heavily on Collier's statement during closing arguments, and specifically linked it to the issue of premeditation. The prosecutor recounted Collier's statement that the two men went looking for money and borrowed the car to go find some, that they cruised around seeking a robbery prospect, that when they found one, they backed the car up, that "Scott [got] out of the car [and] [stuck] the gun through the window of Mr. Lilley." JA 338, and that when Lilley gave "the slightest sign of resistance, [Scott] cold-bloodedly kill[ed] him." JA 349. Precious little of this evidence would have been available to the prosecution in the absence of Collier's confession.

On this record and under these circumstances, the State's concededly unconstitutional admission of Collier's confession had a "substantial and injurious effect" on the jury's deliberations regarding premeditation. Because we cannot say that the error was harmless under *Brecht*, the district court correctly granted a conditional writ of habeas corpus.

IV.

For the foregoing reasons, we affirm the district court's judgment

APPENDIX E

No. 03-1168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARENCE SCOTT,
Petitioner-Appellee,

v.

DAVID GUNDY, Warden,
Respondent-Appellant.

Before SUHRHEINRICH, GIBBONS and SUTTON,
Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk